(374)

APPENDIX A

INTERSTATE INVESTORS, INC.,
Plaintiff,

v.

UNITED STATES OF AMERICA and
Interstate Commerce Commission,
Defendants,

and

Transcontinental Bus System, Inc.,
Intervenor-Defendant.

No. 66 Civ. 3004.

United States District Court
S. D. New York.
July 22, 1968.

(376) OPINION

Before FEINBERG, Circuit Judge, and MURPHY and BRYAN, District Judges.

(377) FREDERICK van PELT BRYAN, District Judge:

This is an action under 28 U.S.C. §§ 2321-25 to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission.

The order dated August 10, 1966, approved the acquisition by the intervenor defendant Transcontinental Bus Lines, Inc. (Transcon), a major intercity bus carrier, of three other bus carriers in the southeastern United States,

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Virginia Stage Lines, Inc. (Virginia), Safeway Trails, Inc. (Safeway) and Queen City Bus Lines, Inc. (Queen). The acquisition was to be effected through an exchange of stock between Transcon and the three acquired carriers. Each of the acquired carriers in turn controlled several subsidiary bus carriers.

The intercity nationwide bus industry is dominated by the Greyhound System. Transcon, though only one-fifth the size of Greyhound prior to the acquisitions under review, is its major competitor. Transcon also is a member of National Trailways Bus System (N.T.S.), a non-profit association whose membership consists of a large number of intercity bus carriers, including the three acquired companies. To foster competition with Greyhound's nationwide operations, the N.T.S. members have adopted Trailways as a common trade name, use uniform paint schemes and markings on their busses, have joint terminals, some through bus arrangements and coordinate advertising, purchasing and other essential functions.

The applications of Transcon to the I. C. C. for approval of the acquisition of Virginia, Safeway and Queen, pursuant to Section 5 of the Interstate Commerce Act, 49 U.S.C. § 5, were made to improve its competitive position in the southeastern United States where it had almost no operations. All three applications were opposed by Greyhound which did not join in this action, and as to the Queen acquisition by Interstate Investors, Inc. (Interstate), the plaintiff here.

Interstate is a Delaware corporation with its principal office in New York. The nature of its business is not clear but it is not a bus operator. Immediately prior to the time

when Transcon reached agreement with Queen, Interstate claims to have made an oral agreement to purchase Queen as a first step toward the formation of a so-called third force of bus carriers in the southeast to compete with Transcon and Greyhound. Interstate further claims that Transcon caused Queen stockholders to breach their oral understanding with Interstate and enter into the exchange of stock acquisition agreement with Transcon instead.

During the pendency of the acquisition proceedings Interstate also filed a complaint with the I. C. C. pursuant to § 11 of the Clayton Act, 15 U.S.C. § 21, alleging that Transcon's conduct prior to the I. C. C.'s approval of the acquisition amounted to an unlawful acquisition of control of Queen and constituted consummated anti-trust violations contrary to § 7 of the Clayton Act.[1] The I. C. C. dismissed this proceeding on the ground that it pertained to issues of fact and record in the acquisition proceedings.[2]

After extensive hearings on the acquisition applications the I. C. C. approved acquisition of Virginia, Safeway and Queen by Transcon and issued the order to that effect here under review. See Transcontinental Bus System, Inc.—Control—Virginia Stage Lines, 101 M.C.C. 529 (1966). In MC-F-8744, embraced in the order under review, Transcon acquired control of Virginia and Safeway, Inc.[3] In MC-F-

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[1] MC-C-4969. The petition was filed December 10, 1965. A supplemental complaint was filed February 11, 1966.

[2] Division 3 of the I.C.C. dismissed the proceeding May 27, 1966 and denied plaintiff's petition for reconsideration on August 8, 1966.

[3] Through the acquisition of Virginia and Safeway, Transcon also acquired control of Trailways of New England (TNE); Tennessee Trailways (Tenn.T); Service Coach Lines; Carolina Scenic Stages; Coastal Stages Corporation; and The Gray Line of Charleston.

8774 the I. (378) C. C. approved Transcon's acquisition of control of Queen.[4] Authority was granted to Transcon to issue additional shares of its common stock to exchange for the stock of the acquired companies.[5] The order also dismissed Interstate's petition for reconsideration of its complaint filed pursuant to § 11 of the Clayton Act which had been previously dismissed.[6]

Interstate then commenced this action to annul and set aside the order. The prolix and confused amended complaint alleges in substance that the order of the I. C. C. was contrary to law, was unsupported by substantial evidence and was procured by fraud upon the Commission upon the part of Transcon. In addition, it contains a private anti-trust claim for relief against Transcon under the Sherman and Clayton Acts and a private claim for deceit.

The present posture of the action is complex. Interstate brought on its application for the appointment of a three-judge court under 28 U.S.C. §§ 2321-25, 2284, by an order to show cause which contained an ex parte temporary restraining order against the enforcement of the I. C. C. order under attack. At the initial hearing before the district judge sitting in motion part the application for the appointment of this three-judge court was granted and Transcon was given leave to intervene as a defendant.

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[4] Through the Queen transaction, Transcon also acquired control of Smokey Mountain Stages; Georgia-Florida Coaches and Fort Bragg Coach Company. Additionally, Transcon acquired Queen's interest in Tenn.T, Scenic, Coastal and Gray.

[5] Finance Docket 23159 (Queen Purchase) and Finance Docket 23123 (Safeway and Virginia purchases).

[6] See note 2, supra.

However, the temporary restraining order was vacated. Interstate's motion for preliminary injunctive relief was reserved for the three-judge court. Both the I. C. C. and Transcon have answered the amended complaint.

During the course of the proceedings a number of motions have been made by the parties which include the following:

1. A motion by Interstate for preliminary injunctive relief which was reserved to the three-judge court at the initial hearing.

2. Motions by the I. C. C. and Transcon to dismiss the action on the ground that Interstate lacks standing to attack the order of the I. C. C. under review.

3. A motion by Interstate to set aside the vacation of the initial temporary restraining order and for other equitable relief on the ground that the decision was brought about by fraud upon the court on the part of Transcon.

4. Several motions by Interstate for discovery against both Transcon and the I. C. C. on a wide variety of subjects.

5. A motion by Transcon to dismiss the private antitrust and deceit claims alleged by Interstate.

The merits of the action and all pending motions were argued before this three-judge court at the same time and will be considered and decided together.

Appendix A

I.

We will deal first with Interstate's claim that the order of the I. C. C. under attack here was obtained by fraud upon the I. C. C. on the part of Transcon and that Transcon has continued such fraudulent conduct in this court. Compare Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944); Chas. Pfizer & Co. v. Davis-Edwards Pharmacal Corp., 385 F.2d 533 (2d Cir. 1967); Root Refining Co. v. Universal Oil Products, Co., 169 F.2d 514 (3d Cir. 1948), cert. denied, Universal Oil Products Co. v. William Whitman Co., Inc., 335 U.S. (379) 912, 69 S.Ct. 481, 93 L.Ed. 444 (1949); Chicago Title & Trust Co. v. Fox Theatres Corp., 182 F.Supp. 18 (S.D.N.Y. 1960). In order to understand Interstate's claim of fraud, a brief review of the background of this case is necessary.

For several years Transcon, the largest member of N. T. S., has been seeking control of other N. T. S. members. At the time of the events in suit Transcon's routes were nationwide with the exception of through-routes running north and south along the Atlantic Coast. Several other N. T. S. members, including Virginia, Safeway and Queen, operated routes in this area. By agreements among these and other companies, N. T. S. was able to offer through service along the Atlantic Seaboard.

In the 1960's, Interstate and its President, Burt, became interested in welding the Trailways carriers running along the Atlantic Seaboard into a single unit. Having acquired financial backing, Burt on behalf of Interstate sought to purchase control of some of these companies. He directed

his attention primarily to two, Queen and Tamiami.[7] By early 1964 talks between Interstate and the controlling stockholders of Queen had progressed toward agreement. By March 28, 1964, Burt and Interstate claim they had a deal to purchase all of Queen's stock for approximately $8,000,000.

Transcon had long been interested in acquiring Queen and had conducted negotiations on and off with several major Queen stockholders for some years. When it learned of the possible Queen-Interstate deal, either from Queen or by letter from Interstate, Transcon immediately started negotiating in earnest.

By letter dated April 28, 1964, the President of Queen proposed an arrangement to Transcon. The suggested purchase price was about $8,000,000, approximately the same as offered by Interstate, but involved an exchange of stock. The letter also stated four conditions, the last of which was a guarantee by Transcon to buy back from some of the Queen's stockholders who wanted to cash the Transcon stock at a fixed price of $31.50 per share. Interstate focuses on this fourth proposed condition of guaranteed repurchase.

On May 21, 1964, the Queen board approved a counter-offer by Transcon which did not mention any conditions of the April 28 letter. Prior to such approval, the Queen directors implemented all of the other conditions of the letter, but no mention was made of any arrangement to

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[7] Tamiami Trail Tours, Inc. is a member of N.T.S. principally operating in Georgia and Florida. It is not involved in the acquisitions under review.

provide Queen's stockholders with cash for their Transcon stock.

The purchase agreement provided for the exchange of 7.25 shares of Transcon common stock for each share of Queen stock.[8]

Queen stockholders were to assent to the transaction by delivering their Queen shares to a named bank as depository. The depository bank would then issue a receipt corresponding to the number of shares delivered. The stock deposited would be held by the bank pending determination of Transcon's application to the I. C. C. for approval of control. If approval were granted, the deposited stock would be transferred to Transcon and Transcon would issue shares of its common stock in return for the deposit receipts. During the period of deposit, the holders of the receipts had the voting and dividend rights to the Queen stock. Prior to consummation, Queen was not to perform any act or enter into any transactions outside its ordinary course of business and Transcon (380) was to take no action which would dilute the value of its common stock. The entire agreement, as well as Transcon's application to the I. C. C. for approval of control,[9] was conditioned on a favorable ruling from the Internal Revenue Service that the exchange of stock was tax-free.

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[8] The agreement also involved the exchange of 7.25 shares of Transcon for each share of General Realty and Insurance Corp. (GRIC) a non-carrier owned by some of Queen's stockholders and in turn owning stock in Queen.

[9] Transcon's application for control of Virginia and Safeway was filed with the I.C.C. May 2, 1964; its application for control of Queen was filed June 5, 1964. The proceedings were consolidated by the Commission.

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Before the I. C. C. examiner opened hearings in the fall of 1964, two significant events occurred. Interstate filed suit against Queen and the Queen stockholders in the United States District Court for the Western District of North Carolina for breach of contract, seeking money damages and not specific performance. Transcon was not a party to the action. During the same period, several Queen shareholders sold their deposit receipts for cash.[10] It is not presently disputed that the receipts ultimately came into the hands of a Transcon subsidiary.[11] Interstate alleges that these purchases were made pursuant to a secret agreement by Transcon to purchase the receipts of these Queen's stockholders who wanted cash.

When the hearings opened in Washington on September 9, 1964, Interstate questioned the Transcon witnesses in an effort to establish that such a secret agreement existed. Moore, the President of Transcon, testified in response

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[10] The record shows that 10 Queen stockholders sold deposit receipts for 1387 shares of Queen stock prior to the opening of hearings. The sales occurred on six different dates. The sums paid ranged from $250 per share to $290 per share. After the hearings closed 617 additional shares were sold at prices ranging from $241.25 per share to $260 per share. The total of 2,004 shares represents less than 10% of the 22,264 shares of Queen outstanding. As will appear later, all of these shares were purchased by Highway Insurance of Switzerland, a corporation the I.C.C. found was presumptively controlled by Transcon. See 101 M.C.C. at 540 n. 7.

[11] According to Footnote 16 of the I.C.C. brief the purchases were all made by Messrs. Goff, General Counsel of Transcon, Scheitel, Chief Financial Officer of Transcon, Hamilton and Robinson, two other employees of Transcon.

to questions from Greyhound's counsel that Transcon did not make a market for the deposit receipts.[12]

Similar questions were asked by Interstate of Scheitel, the Vice-President of Transcon, who negotiated the contracts with Queen, Virginia and Safeway. He testified that while he had learned some of the deposit receipts had been sold, he did not know who had bought them.[13] He empha-

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[12] The pertinent questions and answers are as follows:

"Question: Have you, or any officer, to your knowledge, of Transcontinental, Continental or its subsidiaries, agreed, by contract or by oral agreement, to supply the funds necessary to purchase the depository receipts or to make a market in these depository receipts."

"Answer: They have not." [Hearings p. 971].

"Question: And a final question: What you are saying here in this hearing is that you know nothing about the market that was made in these depository receipts?"

"Answer: I don't know that there is a market as such."

"Question: But you did seek * * *

"Answer: I understood from the testimony yesterday that there had been some trading. I mean, is this one, or is this ten trades, or one trade, or a hundred trades? How many, I have no knowledge of."

"Question: And are you also saying whether there was one or ten, you knew not how the trade or how the market was set up?"

"Answer: No, Transcontinental has no commitments. I mean, we have no part of it." [Hearings p. 973]

[13] In view of the disclosure in the I.C.C. brief, see note 11 supra, that Scheitel was one of the four Transcon officials who purchased the deposit receipts, this testimony is plainly incredible if it referred to the deposit receipts.

sized that Transcon (381) had made no commitment to provide a market for the deposit receipts.[14]

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[14] The relevant part of Scheitel's testimony is as follows:

"Question: Has Transcontinental at any time advised people where, the shareholders where they would find a market for the depository receipts?

"Answer: Yes, sir. The depository receipts were issued on the basis that they were marketable, and if they could find a market fine.

"Question: Did Transcontinental advise them where they could find such a market?

"Answer: We told them they should go to their brokers.

"Question: Did you suggest the name of a broker?

"Answer: We suggested the possibility of Goodbody and Company that made a market in Transcontinental stock, might be interested, yes, sir.

"Question: Have you made any backup arrangement with Goodbody and Company?

"Answer: No, sir.

"Question: Is there privity between Goodbody and Company and stockholders or directors of Transcontinental?

"Answer: No, sir.

"Question: And, to your knowledge, have the trust receipts been marketed?

"Answer: I understand, I think somebody sold, yes.

"Question: Was it a part of your prior negotiations on the consideration that there would be such a market?

"Answer: No, sir. [Hearings pp. 200-01].

"Question: Well, if * * * you will concede that if this transaction is not approved by the Commission, what Goodbody and Company is making a market in is not Transcontinental stock, but in Queen City stock, for which there is no market?

"Answer: I don't know that they are making a market in Queen City stock.

"Question: But you know that some has been sold?

"Answer: I don't know who bought it.

"Question: Pardon me?

"Answer: Queen City—repeat your question, please.

"Question: You know that some has been sold?

"Answer: I was told some was sold.

"Question: You say there was no part of your prior discussions with the selling—holding shareholders that there would be a market for their trust receipts provided by Goodbody and Company?

"Answer: No, sir." [Hearings pp. 202-03].

Plaintiff argues that this chain of testimony establishes that Transcon had a side agreement to purchase deposit receipts from those Queen shareholders who wanted cash. Interstate points out that prior to Commission approval deposit receipts representing 2004 Queen shares, or approximately 10% of Queen stock outstanding, were sold through various brokers.[15] It now appears that these receipts were purchased in the first instance by four Transcon officers, including Scheitel,[16] evidently for the account of Highway Insurance Company of Zurich, Switzerland, a company controlled by Transcon.[17] From this, plaintiff concludes that Moore and Scheitel testified falsely concerning their knowledge as to the identity of the purchaser of the deposit receipts.

Interstate would also carry the chain of inference one step further. The letter of April 28, 1964, from Queen to Transcon offering to sell at $8 per share contained a condition guaranteeing the repurchase of Transcon shares at an agreed price. The testimony is clear that the April 28 offer was rejected by Transcon, and that the final purchase agreement did not include such a condition.

Interstate argues, however, that the evidence shows that Transcon did agree informally to make a market for the receipts and that its officers deliberately falsified their testimony to conceal the (382) existence of such an agree-

[15] See note 10 supra.

[16] See note 11 supra.

[17] Highway Insurance is a Swiss corporation authorized to write all types of insurance outside of Switzerland. Highway is evidently a wholly-owned subsidiary of Western Sales, Inc. Transcon owns 49% of Western's stock, having distributed the remaining 51% to its shareholders in September 1964. The I.C.C. found that Transcon controlled both Western and Highway. 101 M.C.C. at 540 n. 7.

ment. It points to a letter from Moore to Hardison, a major Queen stockholder, accompaning the final agreement to the effect that the deposit receipts could be issued to represent any number of Queen shares, and that they were assignable and prime loan collateral. Additionally, Transcon, through Scheitel, suggested that Goodbody and Company might be able to make a market for the receipts, despite the poor market potential for Queens shares.[18] Finally, Transcon did in fact purchase some deposit receipts, albeit indirectly.

[1] Plainly the fact that false or misleading testimony was given during the course of a judicial proceeding does not constitute a fraud upon the court unless it appears that the court was so misled by such testimony as to render a decision based on a mistaken view of the material facts. See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246-247, 250, 64 S.Ct. 997, 88 L.Ed. 1250 (1944); American Cyanamid Co. v. F. T. C., 363 F.2d 757, 772-779 (6th Cir. 1966), on remand, 3 CCH Trade Reg. Rep. ¶ 18,077 (Sept. 29, 1967). This is of course equally true in an administrative proceeding.

[2] There has been no showing here that the I.C.C. was in any material way mislead by the testimony relied upon by Interstate or that it based any part of its decision on a mistaken view of the facts.

Let it be assumed for purpose of argument that Transcon concealed the fact that it purchased deposit receipts for

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[18] Queen's shares were closely held by a few families. No shares had been sold outside of the family groups prior to the issuance of the deposit receipts.

Queen stock prior to Commission approval. Interstate urges that if this be so disclosure of the facts would have led the Commission to a different conclusion because then it would have found unlawful acquisition of control or consummation of the transaction prior to Commission approval in violation of § 5(4) of the Interstate Commerce Act, 49 U.S.C. § 5(4).

[3] Plaintiff's reliance upon § 5(4) is misplaced. The record shows that Transcon acquired deposit receipts representing approxixmately 10% of the stock of Queen and 2% of the stock of Virginia. 101 M.C.C. at 539-40. In addition, Transcon had purchased 21% of the stock of Safeway in October 1963. 101 M.C.C. at 540. Having found these facts, [19] the Commission concluded that Transcon had not acquired unlawful control of Virginia, Safeway or Queen within the meaning of § 5(4). 101 M.C.C. 543. In reaching its conclusion the Commission applied the proper test that under § 5(4) control means the power to exercise control or management of the controlled company's operations. See e.g., Gilbertville Trucking Co. v. United States, 371 U. S. 115, 83 S.Ct. 217, 9 L.Ed.2d 177 (1962); Missouri-Pacific R. Co.—Control—Chicago & E.I.R. Co., 327 I.C.C. 279 (1965), aff'd sub nom. Illinois Central R. Co. v. United States, 263 F.Supp. 421 (N.D. Ill.1966), aff'd per curiam, 385 U.S. 457, 87 S.Ct. 612, 17

[19] Interstate also argues that Transcon's concealment of these facts misled the plaintiff into settling its suit against Queen and the Queen stockholders. If this be so plaintiff's remedy lies in the District Court for the Western District of North Carolina which approved the settlement and dismissed the action, and not here.

L.Ed.2d 509 (1967).[20] There was no such control here and the Commission's conclusion is amply supported by the record.

Interstate complains that the Commission made no finding with respect to plaintiff's theory that Transcon had (383) agreed to make a market for the deposit receipts. This is not surprising, however, in view of its ruling, which we have affirmed, that on all the facts presented Transcon's actual ownership of some deposit receipts did not amount to an unlawful acquisition of control in violation of § 5(4).

In reaching its conclusion, the Commission correctly imputed to Transcon control of Western and Highway and ownership of the deposit receipts which had been sold. 101 M.C.C. at 540 n. 7. While the I. C. C. report does not contain an explicit finding that there was no secret agreement on the part of Transcon to purchase or make a market for the deposit receipts, the evidence in the record was quite sufficient to support such a finding. Transcon and Queen officials strenuously denied that there was any such commitment, and the Commission was entitled to credit their testimony. Of course, Transcon's purchase of some deposit receipts does not, by itself, establish the existence of such an agreement.

Moreover, it is significant to note that the I.C.C., upon whom plaintiff alleges fraud in this respect was com-

[20] Plaintiff argues that Transcon's pre-approval purchases of deposit receipts constitute an anti-trust violation within the meaning of Carnation Co. v. Pacific Westbound Conference, 383 U. S. 213, 932, 86 S.Ct. 781, 15 L.E.2d 709, 851 (1966). We need not decide this question in view of our disposition of plaintiff's private anti-trust claim. See Section II, infra.

mitted, makes no such claim to us. Instead, it points out to us in its brief that the Commission found that the "purchase of the depository receipts [was not] a partial consummation of the transactions," 101 M.C.C. at 543, and urges that this necessarily included a finding that there was no agreement, formal or informal, to purchase the receipts.

In view of these findings and conclusions there is no merit to Interstate's contention that the testimony complained of resulted in an order tainted with fraud. There is no showing of reliance by the Commission upon false or misleading testimony, or any indication that the Commission was misled. Equitable intervention by this court is plainly not warranted. Cf. Chas Pfizer & Co. v. Davis-Edwards Pharmacal Corp., 385 F. 2d 533, 537 (2d Cir. 1967); Root Refining Co. v. Universal Oil Products Co., 169 F.2d 514 (3d Cir. 1948).

Finally, Interstate charges that fraud was committed on the Commission in that Transcon and Queen obtained a favorable tax ruling from the Internal Revenue Service under § 368(b) of the Internal Revenue Code on the exchange of stock by concealing or falsifying the facts with respect to the alleged agreement to purchase and the purchase of Queen's stock by Transcon for cash. Interstate argues that since the approval of the acquisition was conditioned upon such a favorable tax ruling its concealment was in effect a fraud upon the Commission.

Whether in fact such an alleged agreement and purchase would have barred the transaction from qualifying under § 368(b) is in dispute and it is unnecessary to pass upon that question here. The only connection between the tax

consequences of the excahnge of stock transaction and the petition to review is that Transcon's application to the Commission and its contract of purchase were conditioned upon a favorable ruling. The letter ruling was obtained by Queens and Transcon on the basis of facts stated by them to the Revenue Service. Based upon these facts, the Revenue Service determined the tax consequences of the transaction. A favorable letter ruling was issued with respect to Queen on June 15, 1965, and made part of the I.C.C. record as a late-filed exhibit. The letter ruling states that "there is no commitment, formal or informal, by Transcontinental * * * to purchase stock from any of the shareholders of Queen or Realty after consummation of the proposed exchange, or to purchase depository receipts before that time."

[4] The Commission knew plaintiff had made its claims to the Revenue Service, including assertion of the secret agreement theory; it is also a matter of record that its own Bureau of Enforcement had conducted an investigation.[21] Moreover, whatever might be the interest of the Revenue Service, which plaintiff (384) has kept advised,[22] in the tax consequences of the acquisition and the factual justification therefor, it does not lead to nonenforcement of the Commission order. The conditioning of Transcon's application for control upon a favorable letter ruling does not af-

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[21] See Brief for the I.C.C. at p. 50 and n. 22.

[22] See letter of William R. Burt to Reorganization Branch, Internal Revenue Service, dated October 30, 1964, included as Exhibit E to Complaint Exhibit F; Letter from William R. Burt to Sheldon S. Cohen, Commissioner of Internal Revenue, dated December 7, 1966, included as Exhibit 84 to plaintiff's supplemental appendix.

fect our conclusion. If the ruling is withdrawn, then Transcon or Queen must apply to the I.C.C. for appropriate relief, if they so desire. It should be noted that the I.C.C. order under review is not conditioned upon the continued validity of the letter ruling.

Nor does Interstate's claim that Transcon concealed its 100% ownership of Western Sales during part of August and September, 1964, provide any basis for relief in this proceeding. The letter ruling states that Western was only a 49% subsidiary of Transcon in June, 1965, a statement apparently accurate at that time. Plaintiff argues, however, that Transcon's 100% ownership of Western during a period in 1964 when Highway, a wholly owned subsidiary of Western, purchased some of the Queen deposit receipts would, if disclosed to the Revenue Service, defeat the letter ruling. Regardless of the tax consequences which might flow from Transcon's 100% ownership of Western for a short period, no attempt was made to conceal that fact from the I.C.C. Both the examiner and the Commission found as a fact that Transcon held 100% of Western's stock during part of 1964, until it distributed 51% of Western to its own shareholders. See Examiner's Report p. 29 n. 15; 101 M.C.C. at 540 n. 7. These findings are amply supported by the record.[23]

Upon this record it is plain that plaintiff has not established that the order under review was obtained by fraud. Plaintiff's motion for equitable relief based on fraud is denied.

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[23] Both Moore, see Hearings pp. 69-70, 898, and Scheitel, see Hearings pp. 167, 231-32, testified as to Transcon's 100% ownership and the subsequent dividend.

Plaintiff has also requested that this court conduct a plenary investigation of the facts, and that it be allowed discovery with respect to the fraud allegations. Since we agree with the Commission and the United States that the Commission was not materially misled, these motions are also denied.

II.

Plaintiff has joined in its action for review of the I.C.C. order approving Transcon's control application, a civil suit against Transcon. The amended complaint alleges claims for relief based on deceit and the anti-trust laws, Sherman Act §§ 1, 2, 15 U.S.C. §§ 1, 2; Clayton Act § 7, 15 U.S.C. § 18, and seeks divestiture, treble-damages, and an accounting. Both Transcon and the I.C.C. urge that this private action is not properly before the statutory three-judge court.

[5-7] We are mindful that the three-judge procedure should be used sparingly in view of the heavy demands it makes upon judicial manpower, and the burden that direct appeal imposes on the Supreme Court. See United States v. Interstate Commerce Commission, 337 U.S. 426, 69 S.Ct. 1410, 93 L.Ed. 1451 (1949); Utica Mutual Ins. Co. v. Vincent, 375 F.2d 129, 130-131 (2d Cir. 1967). Consequently the rule has evolved that private claims should not be joined with a petition to review an I.C.C. order unless they are ancillary to or dependent upon the judgment of the court as to the Commission's order. Pittsburgh & W. Va. Ry. Co. v. United States, 281 U.S. 479, 50 S.Ct. 378, 74 L.Ed. 980 (1930); compare Luckenbach S. S. Co. v.

United States, 179 F.Supp. 605, 614 (D.Del. 1959), modified on other grounds, 364 U.S. 280, 80 S.Ct. 1611, 4 L.Ed.2d 1719 (1960). Where the factual basis of the (385) private claims are related to the petition to review, the decision whether to permit joinder before the three-judge court is largely discretionary. See Atlantic Lumber Corp. v. Southern Pac. Co., 47 F.Supp. 511 (D.Ore.1942) (3 judges); id, 47 F.Supp. 514 (D.Ore.1942) (1 judge).[24]

Plaintiff's argument that joinder should be permitted in this case is based largely upon Luckenbach S. S. Co. v. United States, supra, which held that the anti-trust issues and the petition to review were "so inextricably enmeshed that it would be unwarranted to truncate the litigation at this juncture." 179 F.Supp. at 614. There, both claims involved the effect upon the petitioning coastal shipowners of a railroad joint rate which the Commission had refused

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[24] Plaintiff argues that once our jurisdiction is properly invoked by the petition to review, we have the power to decide, and must decide, all questions of law and fact presented, citing Railroad Commission of California v. Pacific Gas & Electric Co., 302 U.S. 388, 391, 58 S.Ct. 334, 82 L.Ed. 319 (1938), and Sterling v. Constantin, 287 U.S. 378, 393-394, 53 S.Ct. 190, 77 L.Ed. 375 (1932). These cases hold only that a statutory three-judge court may decide any question of state or federal law necessary to decision, and are simply a corollary to the rule that once our jurisdiction is properly invoked, we may decide the case on any ground, including grounds that would not justify our convocation. See United States v. Georgia Public Service Commission, 371 U.S. 285, 83 S.Ct. 397, 9 L.Ed.2d 317 (1963). When the issue presented is collateral to the petition for review, as where a merger approved by the I.C.C. is alleged to be violative of the corporate charter of one of the carriers, the collateral issue is not within the jurisdiction of a three-judge court. See Pittsburgh & W. Va. Ry. Co. v. United States, 281 U.S. 479, 50 S.Ct, 378, 74 L.Ed. 980 (1930); Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. United States, 275 U.S. 404, 48 S.Ct. 189, 72 L.Ed. 338 (1928).

to suspend. There is no such close connection between the two branches of Interstate's complaint. The primary issue presented by the petition to review is whether the Commission's finding that the acquisitions of control are in the public interest is supported by substantial evidence. Plaintiff's private action against Transcon centers about its alleged contract to purchase Queen, and the consequences flowing from Transcon's conduct prior to Commission approval of these acquistions.[25]

[8] In our view, the issues presented by the petition to review are so different from those raised by plaintiff's private action that joinder is unnecessary to an effective review of the I.C.C. order. See Pittsburgh & W. Va. Ry. Co., supra. Consequently, we dismiss those portions of plaintiff's complaint seeking private relief from Transcon without prejudice to the filing within sixty days of an amended complaint stating the private claims for relief only to be heard before a single district judge.

III.

Plaintiff has moved for pre-trial discovery on the merits against both defendants. Its motions seek depositions and the production of documents by Transcon, and access to internal staff memoranda and opinions from the I.C.C. Both defendants oppose these motions on the ground that

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[25] In view of our holding that the Commission's order is supported by substantial evidence, see Section IV infra, the acquisitions themselves are exempted from the anti-trust law, 49 U.S.C. § 5 (11). Thus plaintiff's anti-trust remedies, if any, are limited to the period prior to Commission approval. Carnation Co. v. Pacific Westbound Conference, 383 U. S. 213, 932, 86 S. Ct. 781, 15 L. Ed. 2d 709, 851 (1966).

pre-trial discovery is not permitted in an action to review an I.C.C. order; in addition, the I.C.C. asserts a claim of privilege with respect to its internal memoranda and opinions. See T.S.C. Motor Freight Lines, Inc. v. United States, 186 F.Supp. 777 (S.D.Tex. 1960), aff'd sub nom. Herrin Transp. Co. v. United States, 366 U.S. 419, 81 S.Ct. 1356, 6 L.Ed.2d 387 (1960).

[9, 10] On review of an I.C.C. order, this court's task is limited to determining whether the Commission's conclusions are adequately supported by its (386) findings of fact, and whether the findings are supported by substantial evidence on the record as a whole. E. g., United States v. Carolina Freight Carriers Corp., 315 U.S. 475, 62 S.Ct. 722, 86 L.Ed. 971 (1942); Eastern Central Motor Carriers Ass'n v. United States, 239 F.Supp. 591 (D.D.C.1965). In making this determination, the court considers only the evidence contained in the record made before the Commission, and cannot accept evidence de novo. See Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 50 S.Ct. 220, 74 L.Ed. 524 (1930); Frozen Food Express v. United States, 219 F.Supp. 131 (N.D. Texas 1963); cf. Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282, 54 S.Ct. 692, 78 L.Ed. 1260 (1934). The only exceptions are cases falling within the jurisdictional facts doctrine, see Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932), or challenging a rate order as confiscatory, see American Trucking Ass'ns v. United States, 344 U.S. 298, 73 S.Ct. 307, 97 L.Ed. 337 (1953); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033 (1936). This case falls within neither of these exceptions

and we are limited to consideration of evidence contained in the record made before the I.C.C.

[11, 12] Rule 26 entitles a party to examine his opponent as to any matter not privileged which is reasonably calculated to lead to the discovery of admissible evidence. While Rule 26 should not be read narrowly, it plainly precludes depositions in those situations where no evidence could be admitted in any event. See Walled Lake Door Co. v. United States, 31 F.R.D. 258 (E.D.Mich.1962). Nor has plaintiff shown the requisite good cause to entitle it to discovery and inspection pursuant to Rule 34. Plaintiff's motions for discovery are denied.

IV.

With these matters disposed of we turn to the merits.

Interstate claims that the order of the I.C.C. should be set aside because:

(a) The issuance of deposit receipts by Transcon without prior Commission approval violated § 20a(2) of the Interstate Commerce Act, 49 U.S.C. § 20a(2).

(b) The issuance of these receipts and Transcon's purchase of some of them gave Transcon prior control of Queen in violation of § 5(4) of the Interstate Commerce Act, 49 U.S.C. § 5(4).

(c) Transcon's conduct with respect to the issuance and purchase of deposit receipts violated § 7 of the Clayton Act, 15 U.S.C. § 18.

(d) The Commission ignored the anti-competitive effects of permitting a duopoly in the intercity bus industry.

Appendix A

A. The Section 20a claim.

Section 20a(2), made applicable to motor carriers by 49 U.S.C. § 314, makes it unlawful for any carrier "to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier * * * or to assume any obligation or liability * * * in respect of the securities of any other person" without obtaining prior approval from the I.C.C. Approval may be granted only if the Commission finds that the issue "(a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

Interstate argues that the deposit receipts issued by the respective depository banks to assenting stockholders of Queen and other acquired companies in return for their stock constitutes securities within the meaning of § 20a, and their issuance without prior commission approval voids the acquisition transactions.

This argument was not raised before the Commission until August 24, 1966, two years after the receipts had been issued, and after the I.C.C. had rendered its decision. Prior to August 1966, Interstate had insisted that the deposit receipts were subject to the registration (387) requirements of the Securities Act of 1933. To maintain this position, plaintiff was forced to assert that the deposit receipts were not within the purview of Section 20a, in order to avoid the exemption of regulated carriers' securities from S.E.C. jurisdiction contained in 15 U.S.C. § 77c(6).

[13, 14] It is well settled that the refusal of the Commission to reopen a case to consider an argument presented for the first time after decision was rendered will not be overturned unless its action was a clear abuse of discretion. United States v. Pierce Auto Freight Lines, 327 U.S. 515, 535, 66 S.Ct. 687, 90 L.Ed. 821 (1946); United States v. Northern Pac. Ry. Co., 288 U.S. 490, 53 S.Ct. 406, 77 L.Ed. 914 (1933). Here, the Commission's refusal was clearly justified by the failure of Interstate timely to raise the issue, the dubious merit of its claim and the complete absence of any prejudice to Interstate. Nor is it surprising, considering the late date of Interstate's petition for reconsideration, that the Commission set forth no reasons for denying it. Compare Yourga v. United States, 191 F.Supp. 373, 377 (W.D.Pa.1961); Carolina Scenic Coach Lines v. United States, 59 F.Supp. 336 (W.D.N.C.), aff'd per curiam, 326 U.S. 680, 66 S.Ct. 37, 90 L.Ed. 398 (1945).

[15] The key issue is whether the deposit receipts, used as a mechanism for maintaining the status quo pending application to the I.C.C. for approval, are to be treated as securities within the meaning of § 20a. The dominant Congressional purpose in enacting that section was to protect investors in the securities of railroads and other carriers from the all too frequent abuses of financial manipulation, watered stock, and over-extended capital structures. See Chicago S. Shore & S. Bend R. R. v. United States, 221 F.Supp. 106 (N.D.Ind.1963); Sharfman, The Interstate Commerce Commission 190 (1931).

Thus it was provided that before a *carrier* could issue any capital stock, bonds, or long term notes, assume lia-

bilities or other obligations, it must apply to the Commission for authority to do so, upon a showing of the corporate purpose underlying the transaction and compatibility with the public interest. The requirement of prior Commission approval has also been held to apply to any transaction by which a carrier changes or affects the terms of some or all of its securities. See United States v. New York, New Haven & Hartford R. R. Co., 276 F.2d 525 (2d Cir. 1960).

[16] In our view this established body of law does not compel the conclusion that the deposit receipts used here are securities as that term is used in § 20a. First, it should be noted that the deposit receipts were not issued by Transcon with respect to *its* stock, but by the depository bank as a receipt for shares of Queen deposited with it by Queen shareholders. Thus the deposit receipts could scarcely be viewed as securities of Transcon, as Interstate seems to claim, but only as securities of Queen.

The deposit receipts did not affect the capital structure of Queen, or alter the terms of Queen stock to the disadvantage of its shareholders or in violation of its corporate purpose. Nor did they entitle Transcon to any control of Queen prior to Commission action or affect its financial condition. Only when the I.C.C. acted upon Transcon's application for control, an application which also requested authority to issue the Transcon shares necessary to perform the exchange agreement, did Transcon issue any securities. Thus it seems plain that the deposit receipts are not securities requiring § 20a approval prior to issuance, though the Commission has, upon application, accepted jurisdiction over similar receipts and

given such approval. See Delaware, L. & W. R. R. Co., Merger, 257 I.C.C. 91 (1944). Moreover, the Commission's action in approving Transcon's issuance of stock necessarily included consideration of the propriety of the deposit receipts and recognized their validity. Compare New York, Chicago & St. Louis R. R. v. Frank, 314 U.S. 360, 62 S.Ct. 258, 86 L.Ed. 277 (1941); (388) Breeding Motor Freight Lines v. Reconstruction Finance Corp., 172 F.2d 416 (10th Cir. 1949).

[17] Finally, it should be noted that the remedy provided for violation of § 20a is that the security shall be void. 49 U.S.C. § 20a(11). Subsection 11 also provides that any holder of a void security who acquired it in due course from any person may sue for damages, and that one who bought directly from the issuing carrier may at his option sue for damages or rescind. Plaintiff does not fit within Subsection 11, and could not take advantage of its provisions were the deposit receipts void or voidable. It certainly has no such remedy in this proceeding.[26]

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[26] We do not understand the decision of the Supreme Court last term in Denver & Rio Grande Western R. R. Co. v. United States, 387 U.S. 485, 87 S. Ct. 1754, 18 L.Ed. 2d 905 (1967) to affect our conclusions. There the court held that when a corporation subject to I.C.C. jurisdiction sought approval under § 20a to issue stock, amounting to 20% of its outstanding stock, to another carrier, as part of a program leading to control by the other carrier, the Commission is obligated to consider at that stage in the proceedings whether issuance of the stock to the other carrier would pass control or violate the Clayton Act. We read the case to mean that where an acquisition by one carrier of stock in another carrier comes to the attention of the Commission, it must determine, at the earliest practicable stage, whether the transaction will pass control and whether it is in the public interest. Here we feel that criterion was met by the I.C.C. determining that the entire transaction was consonant with the National Transportation Policy upon an application seeking authority under both § 20a and § 5(2).

B. Claimed violation of Section 5(4).

Section 5(4) of the Interstate Commerce Act, 49 U.S.C. § 5(4), makes it unlawful for any person to control, or exercise the power of control over, the management of any carrier without obtaining prior approval from the Commission. Interstate asserts that Transcon committed two violations of § 5(4) by first, its purchases of a small number of Queen deposit receipts, and second, through power given Transcon over Queen by the terms of the deposit receipts themselves. We have already affirmed the Commission's finding that Transcon did not acquire control of Queen through purchases of deposit receipts. (supra, p. 382). Plaintiff's second contention need detain us little longer.

[18] Interstate points to the language of the deposit receipts which made the deposit irrevocable except upon the joint consent of Transcon and Queen, and which prohibited either Transcon or Queen from taking any action outside the ordinary course of business without the consent of the other party. These provisions are said to have given Transcon an effective veto power over Queen's operations by preventing Queen's management from making major policy decisions on its own, and by keeping the Queen stockholders locked into the deal with Transcon.[27]

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[27] While the deposit receipts entitled the holder to receive the dividends from and to vote the underlying Queen shares, his freedom of choice was circumscribed. Queen could not withdraw from the exchange agreement without breaking its contract with Transcon. Nor could it have changed the course of its business without running the risk of violating the deposit agreement. If a holder of Queen deposit receipts became dissatisfied he was free to transfer the receipts to another, but the transferee would remain bound by the terms of the deposit agreement.

In our view, however, these factors would not have warranted a finding by the Commission that Transcon had acquired in fact the power to control the regular operations of Queen. Compare Gilbertville Trucking Co. v. United States, 371 U.S. 115, 83 S.Ct. 217, 9 L.Ed.2d 177 (1962). While the I.C.C. made a general finding that Transcon did not have control of Queen prior to Commission approval, see 101 M.C.C. at 543, there is no specific finding that the terms of the deposit receipts did not serve to pass that power to Transcon. This is not surprising in view of Interstate's (389) failure to present the argument it now makes to the Commission. Even in the doubtful event that a technical violation of § 5(4) could be found to have occurred, the Commission would have been justified, in finding, particularly in light of its conclusion that the transaction was in the public interest, that the transgression did not warrant denying the public of the benefits of the acquisition. See Illinois Central R. Co. v. United States, 263 F.Supp. 421 (N.D.Ill.1966), aff'd 385 U.S. 457, 87 S.Ct. 612, 17 L.Ed. 2d 509 (1967).

C. Refusal to proceed under § 11 of the Clayton Act.

During the summer of 1965, several months after the hearings before the trial examiner were closed, Interstate wrote to the Commission claiming that Transcon's purchases of deposit receipts violated § 7 of the Clayton Act, 15 U.S.C. § 18, and requesting the Commission to issue a complaint pursuant to § 11 of that Act, 15 U.S.C. § 21. In November 1965, the Commission replied refusing to take action on its own motion and suggesting that Interstate file a formal complaint. On December 10, 1965, after the

examiner's recommended decision had been filed, interstate filed a complaint alleging that Transcon's purchases of deposit receipts violated the Clayton Act.[28] The Commission dismissed the complaint on the ground that it pertained to facts of record and matters at issue in the control proceedings, which had already gone beyond the hearing stage.

Interstate attacks this action of the Commission as an abdication of its responsibilities under § 11. The core of plaintiff's position is the assertion that Transcon's conduct prior to Commission approval, though after it had applied therefor, should be measured under the standards of the Clayton Act, and not of the Interstate Commerce Act. Applying Clayton Act standards, Interstate asserts that stock purchases by competitors, are anti-competitive under § 7, and that Transcon's purchases of deposit receipts fall within the proscription of that section. In this court, plaintiff has added the further claim that the deposit receipts froze-out other prospective purchasers of Queen and thus erected a significant barrier to the entry of new competition into the intercity bus industry.

[19] The duties of the I.C.C. under the Clayton Act cannot be viewed apart from the provisions of § 5 of the Interstate Commerce Act. Whatever merit there might be to plaintiff's theory if a regulated carrier purchased stock in a competitor and took no further action, that is

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[28] The complaint was given docket number MC-C 4969 and was served by the Commission on Transcon, Queen, and the other parties to the acquisition proceedings. The complaint was dismissed by Division 3, and reconsideration was denied by the Commission. See notes 1, 2, supra.

not what happened here. Transcon negotiated for the stock of the three carriers with a view toward obtaining control only if the Commission approved. Transcon did not simply purchase Queen stock for cash, but in exchange for stock to be issued with Commission approval. Thus, it is apparent that the Commission had the opportunity to examine the transaction on the application under § 20a, and at that time to discharge any duties imposed on it by the Clayton Act. Compare Denver & Rio Grande Western R. R. Co. v. United States, 387 U.S. 485, 87 S.Ct. 1754, 18 L.Ed.2d 905 (1967). To hold in these circumstances that the Commission was obligated to consider separately Interstate's petition under § 11 of the Clayton Act, when the same issues were being fully ventilated in other Commission proceedings involving the same subject matter, would place an unwarranted burden on an already overloaded agency.

[20] Moreover, we cannot accept Interstate's argument that the Commission must measure Transcon's pre-approval conduct under the terms of the Clayton Act and not the Interstate Commerce Act. As has been made abundantly clear by the Supreme Court, see, e.g., Penn-Central Merger and N & W. Inclusion (390) Cases, 389 U.S. 486, 498-501, 88 S.Ct. 602, 19 L.Ed.2d 723 (1968); Seaboard Air Line R. R. Co. v. United States, 382 U.S. 154, 86 S.Ct. 277, 15 L.Ed.2d 223 (1965), the principles of the National Transportation Policy, 49 U.S.C. preceding § 1, are the dominant yardstick by which consolidations in the transportation industry are to be measured. Under § 5 of the Interstate Commerce Act, the I.C.C. is given the power to approve a transaction which furthers the National

Transportation Policy even though it might otherwise be contrary to the goals of the Clayton Act.

The sometimes contradictory goals of the anti-trust laws and the Interstate Commerce Act require that each transaction be judged on its own facts. Here Interstate makes two specific claims. First, it argues that Transcon acquired control of the assets of Queen in violation of Clayton Act § 7 when the Queen shareholders assented to the exchange agreement. Even assuming this doubtful proposition, in our view the proper test of control is not the incipiency formula of the Clayton Act, but the standards of §§ 5(4), 5(5) of the Interstate Commerce Act. Under those standards the I.C.C. properly found that control had not passed prior to its approval.

[21] Interstate's second claim is that the terms of the deposit agreement froze-out potential competitors such as Interstate who wanted to buy Queen. The flaw in this argument is the failure to recognize the key premise underlying the regulated transportation industry that entry must be restricted in order to protect the public interest. To enter the bus industry, a potential competitor would either have to apply for certificates of convenience and necessity authorizing the new service, or purchase an extant carrier and obtain approval of the transaction from the Commission. In light of this statutory structure, the deposit receipt mechanism used here can hardly be said to have erected any additional barriers to the entry of new competition.

Giving proper effect to the necessary interaction between the Clayton and Interstate Commerce Acts, we find that the Commission acted well within its discretion in dismissing Interstate's complaint under the Clayton

Act since the matters raised there were fully considered under correct legal standards in the control proceedings. There is no requirement that an agency cover the same ground twice.

D. The "duopoly" theory

Interstate's overriding argument is that by approving these acquisitions the I.C.C. has frozen the intercity bus industry for all time into a "duopoly" dominated by Greyhound and Transcon. According to plaintiff, with the inclusion of the southeastern Trailways carriers into Transcon, there are no longer enough independent companies left to form a third nationwide bus company. This result is said to violate the anti-trust laws and require reversal of the Commission's order.

[22] Much of plaintiff's argument is based on the erroneous legal premise that the Commission must give controlling weight to anti-trust considerations. As the Supreme Court has repeatedly held, while the Commission cannot ignore the policies of the anti-trust laws, the primary considerations are the standards set forth in § 5(2)(c) of the Interstate Commerce Act. See Penn-Central Merger and N. & W. Inclusion Cases, 389 U.S. 486, 498-501, 88 S.Ct. 602, 19 L.Ed. 2d 723 (1968); Seaboard Air Line R. R. Co. v. United States, 382 U.S. 154, 86 S.Ct. 277, 15 L.Ed.2d 223 (1965); Minneapolis & St. Louis Ry. Co. v. United States, 361 U.S. 173, 80 S.Ct. 229, 4 L.Ed.2d 223 (1959); McLean Trucking Co. v. United States, 321 U.S. 67, 64 S.Ct. 370, 88 L.Ed. 544 (1944). In its report approving Transcon's application the Commission carefully explored the effect of the consolidations on the public interest and gave due weight to anti-trust considerations.

[23] First, the Commission noted that the routes of Transcon and the three acquired companies overlapped only slightly, so there was almost no duplication in the service they provided. It was shown that substantial savings (391) could be achieved by joint operation of the companies through centralizing their bookkeeping, volume purchasing, inventory reduction, and more efficient equipment utilization. Transcon's control would also result in better service to the public by the establishment of more through-service schedules replacing present cumbersome and inadequate pooling arrangements. Finally, better terminal facilities could be expected from centralization of policy control of joint terminals in Transcon, and from new terminals which Transcon could build with its superior financial resources. These and the other findings relied on by the Commission amply support its conclusion that the acquisitions are in the public interest.

Turning to Interstate's "third force" argument, the Commission first noted that it was speculative at best.[29]

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[29] Interstate has never made it clear whether its "third force" of intercity bus carriers was to be built by separating the southeastern carriers from N.T.S. or from within N.T.S. If they were separated from N.T.S. this would leave Greyhound as the only carrier group offering nationwide service. If they were to remain in N.T.S. then the question is not one of duopoly, since that condition would still be present, but whether Transcon or Interstate was better fit to control a strengthened N.T.S. There is no persuasive evidence that the stockholders of Queen or the other companies would be willing to deal with Interstate if Transcon's application were rejected. Nor is there any evidence as to Interstate's ability to operate a bus system. Finally, it should be noted that even if a duopoly is assumed to exist, there is no certainty that the industry will retain that structure for all time. It is certainly possible that if increases in intercity bus traffic warrant, the I.C.C. would, upon proper study, create a "third force" by certificating new or additional routes for new carriers.

Evidence at the hearings had shown that many previous attempts to consolidate the southeastern Trailways carriers had failed, and there was no indication that Interstate's efforts would succeed. More importantly, Interstate had not filed any application to purchase or control these carriers, or offered to do so on terms equivalent to Transcon's. Compare Minneapolis & St. Louis Ry. Co. v. United States, 361 U.S. 173, 80 S.Ct. 229, 4 L.Ed.2d 223 (1959). Indeed, it settled and released any rights it might have had to purchase Queen.

Finally, the Commission rejected Interstate's "duopoly" claim, noting that the intercity bus industry had long been dominated by Greyhound with Trailways a poor second.[30] Nor was there any real doubt that Transcon was the most powerful member of the N.T.S. Group. The Commission concluded that the public interest would be best served by strengthening Transcon's hand in N.T.S. in order to make that system a more effective competitor of Greyhound. This was in accord with the similar long-standing I.C.C. policy of encouraging "the unification of the properties of carriers under common control in order to foster efficiency and to lessen wasteful transportation in furtherance of the national transportation policy." 101 M.C.C. at 549. We have carefully reviewed the record and have concluded that the Commission's findings are based on substantial evidence and fully support its conclusion that the acquisitions are in the public interest.

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[30] The record showed that in 1963 Greyhound earned 61% of the operating revenue of Class 1 Intercity Bus Carriers. Trailways earned 23%, which included the 11.27% earned by Transcon. Including the acquired companies would make Transcon's share 18%.

V.

We have considered and determined the merits of the various contentions made by Interstate for the reason that the propriety of the Commission's judgment ought not to be left to speculation in face of the numerous charges of fraud. In doing so, however, we wish it understood that we entertain serious doubts that Interstate has standing to raise its claims in this action in any event[31]

(392) [24-26] The touchstone for standing to sue under the Interstate Commerce Act is whether the Commission action threatens or produces legal injury. Pittsburgh & W. Va. Ry. Co. v. United States, 281 U.S. 479, 50 S.Ct. 378, 74 L.Ed. 980 (1930); Moffat Tunnel League v. United States, 289 U.S. 113, 53 S.Ct. 543, 77 L.Ed. 1069 (1933); Edward Hines Yellow Pine Trustee v. United States, 263 U.S. 143, 44 S.Ct. 72, 68 L.Ed. 216 (1923). The fact of intervention before the Commission is not enough by itself to establish standing. See Seatrain Lines, Inc. v. United States, 152 F.Supp. 619 (D.Del.), aff'd per curiam, 355 U.S. 181, 78 S.Ct. 265, 2 L.Ed.2d 186 (1957). Standing is accorded to competitors whose businesses are affected by Commission action as, for example, when new operating rights are granted or new services authorized. See American Trucking Ass'ns. v. United States, 364 U.S. 1, 80 S.Ct.

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[31] This is not to say that plaintiff lacks standing to assert such private remedies, if any, as it may have under the anti-trust laws. See Carnation Co. v. Pacific Westbound Conference, 383 U. S. 213, 932, 86 S. Ct. 781, 15 L. Ed. 2d 709, 851 (1966); Utah Gas Pipeline Corp. v. El Paso Natural Gas Co., 233 F. Supp. 955 (D. Utah 1964).

1570, 4 L.Ed.2d 1527 (1960); Alton R. R. Co. v. United States, 313 U.S. 15, 62 S.Ct. 432, 86 L.Ed. 586 (1942). Shippers, states, counties or groups, and others, whose interests are affected may also be given standing. See 28 U.S.C. § 2323.

[27] Under these standards it seems plain to us that plaintiff has no interest at all in the acquisition of Virgina and Safeway. Interstate is not a competitor, a shipper, or even a resident of the areas served by these companies. Its sole connection with the bus industry—that it once claimed to have a contract to purchase Queen—is not enough to entitle it to challenge the acquisitions of Virginia and Safeway.

Interstate's position vis-á-vis the Queen transaction is somewhat less remote. It claims to have had a contract to purchase Queen which was allegedly breached at the instance of Transcon. Had it gone before the Commission in that posture and filed a rival application to purchase Queen upon equitable terms satisfacory to the Commission, there is little doubt that it would have had standing to attack the resulting order. But instead of proceeding in this manner, Interstate chose to sue Queen and the Queen shareholders for breach of contract in the federal court for the Western District of North Carolina. It is significant that that suit did not ask for specific performance but sought damages only. After the hearings on Transcon's application were completed and before the examiner's report was filed, Interstate settled its suit with Queen for $25,000. The terms of settlement required Interstate to give releases to Queen, the Queen shareholders and Transcon, and to agree to withdraw its opposition to

the acquisition. Pursuant to this agreement Interstate wrote the I.C.C. and asked to withdraw as a party to this case.

Shortly thereafter, claiming that the settlement had been procured by fraud, and that Burt, its president who controlled it, was not authorized to release Transcon, Interstate cancelled its withdrawal from these proceedings and has been vigorously pursuing the case ever since.[32] At no time has Interstate ever moved to set aside the settlements in the federal court in North Carolina where they were approved and entered, or for that matter offered to return the consideration it received for these agreements.

[28] Thus, while Interstate might have had standing under its contract to purchase Queen, it now appears that it contracted that right away. The releases required by the settlement, if valid, completely discharge any liability the Queen shareholders might have had to sell their stock to Interstate. While we do not pass (393) upon the question of the validity of the releases, we think that the proper way to raise that question is by proceedings to set aside the settlement and order of dismissal in Interstate's action against Queen in the Western District of North Carolina where the settlement was approved and the order entered.

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[32] The Commission steadfastly refused to consider the validity of Interstate's alleged contract to purchase Queen, or whether the settlement and releases were obtained by fraud. The I.C.C. felt that these were private matters to be resolved in court between the parties. These rulings of the Commission were correct.

VI.

In addition to the issues we have discussed, Interstate raises a number of other questions. We have considered all of these in our review of the record and find none of them to have merit or warrant discussion.

We hold that the Commission committed no errors of law requiring reversal and that its findings and conclusions and the order under review are fully supported by substantial evidence in the record as a whole. The order of the I.C.C. under review is in all respects affirmed.

It is so ordered.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

No. MC-F-8744[1]

TRANSCONTINENTAL BUS SYSTEM, INC.—CONTROL—VIRGINIA STAGE LINES, INC.

Decided August 10, 1966

REPORT OF THE COMMISSION

TUGGLE, *Comissioner:*

Exceptions, including a motion to consolidate the instant proceedings with the proceedings in Nos. MC-F-8343[2] and MC-F-8348, and exceptions, including requests (1) for oral argument and (2) that the Commission, on its own motion, designate Nos. MC-F- 8744 and MC-F-8774 as transactions involving issues of general transportation importance, were filed by Greyhound Lines, Inc. (Greyhound), and Interstate Investors, Inc. (Investors), respectively, protestants.

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[1] This report embraces No. MC-F-8774, Transcontinental Bus System, Inc.—Control—Queen City Coach Co., Finance Docket No. 23123, Transcontinental Bus System, Inc., Stock, and Finance Docket No. 23159, Transcontinental Bus System, Inc.—Stock.

[2] *Greyhound Corp.—Control—Tex., N. Mex. & Okla. Coaches,* 97 M.C.C. 733, hereinafter referred to as the *Greyhound* case.

Appendix B

Transcontinental Bus System, Inc. (Transcon), National Trailways Bus System (NTB), Safeway Trials, Inc. (Safeway), and Queen City Coach Company (Queen), replied. Limited exceptions were filed by applicant (Transcon) in Finance Docket Nos. 23123 and 23159. A petition for leave to intervene in opposition to the proceedings in Nos. MC-F-8744 and MC-F- 8774 was filed by Hamish Turner (Turner), and Transcon and Queen replied. Investors also filed a petition requesting that certain late-filed exhibits be accepted, that applicant be required to file certain late-filed exhibits, and that the applications be dismissed with prejudice, and a motion that certain additional data be considered in conjunction with such petition. Our conclusions differ slightly from those of the examiner in Finance Docket Nos. 23123 and 23159.

NATURE OF THE PROCEEDINGS

In No. MC-F-8744, by application filed May 7, 1964, as amended and supplemented, Transcon, of Dallas, Tex., seeks authority under section 5 of the Interstate Commerce Act to acquire control of Virginia Stage Lines, Incorporated (Virginia Stage), of Charlottesville, Va., and Safeway, of Washington, D. C., through purchase of their outstanding capital stock, and, in turn, of Trailways of New England, Inc. (TNE), of Washington, Tennessee Trailways, Inc. (Tenn. T), of Knoxville, Tenn., Service Coach Line, Inc. (SCL), of Tampa, Fla., Carolina Scenic Stages (Scenic), of Spartanburg, S. C., Water Street Equity Corporation (WEC), of Charlottesville, Coastal Stages Corporation

(Coastal), of Spartanburg, and The Gray Line of Charleston (Gray), of Charleston, S. C.

By separate application filed May 13, 1964, in Finance Docket No. 23123, Transcon seeks authority under section 214, and in connection with the above-described control transaction, to issue 824,158 shares of its common capital stock, par value $1 per share, together with such additional shares as may be required to cover any fractional shares to which the participating stockholders might be entitled because of the trade ratios.

In No. MC-F-8774, by application filed June 5, 1964, as amended and supplemented, Transcon seeks similar authority to acquire control of Queen, of Charlotte, N. C., through purchase of its outstanding capital stock, and, in turn, of Smoky Mountain Stages, Inc. (Smoky), Georgia-Florida Coaches, Inc. (Ga-Fla.), Fort Bragg Coach Company, Inc. (Bragg), and General Realty and Insurance Corporation (GRIC), all of Charlotte, and of Tenn T, Scenic, Coastal, and Gray.

By another application also filed June 5, 1964, in Finance Docket No. 23159, Transcon seeks authority under section 214, and in connection with the transaction in No. MC-F-8774, to issue 219,356 shares of its common capital stock, par value $1 per share, together with such additional shares as may be required to cover any fractional shares to which the participating stockholders might be entitled because of the trade ratios.

A hearing was held on a consolidated record, at which Greyhound and Investors opposed the applications, cross-

examined witnesses, and introduced evidence.[3] Initially, The Amalgamated (532) Transit Union filed a formal protest, but stipulated of record with Transcon that the employees involved would not be adversely affected by approval of the transactions, and simultaneously requested the Commission to reserve jurisdiction for a period of 3 years from the date of consummation for the purpose of protecting the interest of such employees. Our findings will be appropriately conditioned. See *Transcontinental Bus System, Inc.-Control,* 85 M.C.C. 383. Briefs were filed by Transcon, Virginia Stage and WEC, Safeway and TNE, Queen and GRIC, Greyhound, and Investors. Transcon operates substantially more than 20 vehicles in transportation in interstate or foreign commerce subject to part II of the act. The factual findings set forth in the examiner's report are substantially accurate and are adopted by us. Only those facts necessary for our discussion have been repeated here.

The Parties to the Applications

Transcon's corporate history, organization, affiliation, and operations are described in *Continental Tenn. Lines, Inc.-Control-Tennessee Coach,* 87 M.C.C. 775 (the *Tennessee* case), and the case cited therein. Transcon has numerous stockholders, the 10 largest holding approximately 42 percent, and none more than 8 percent. In

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[3] Petition of Investors for reopening of proceedings for further hearing was denied by order of division 3, dated November 24, 1965. Petition for reconsideration of said order is being denied concurrently herewith.

Transcontinental Bus System, Inc.-Control, supra, it was found that no single stockholder or group of affiliated stockholders controlled or had the power to control Transcon within the purview of the principle enunciated in *Refiners Transport & Term. Corp.-Purchase-Marshall,* 39 M.C.C. 271, and the same conclusion is warranted here. Transcon and the other carriers involved in these transactions are members of NTB, a voluntary, nonprofit association composed of some 44 motor common carriers of passengers, which offers its members advantages of a trade name, standardized bus colors, and joint advertising.

Transcon's operations are divided into three divisions, Continental Central Lines, Continental Dixie Lines, and Continental Western Lines. With its 16 subsidiaries, Trascon operates over routes in 36 States, extending generally to New York, N. Y., Philadelphia, Pa., and Washington, D. C., on the east, Atlanta, Ga., New Orleans, La., Brownsville and El Paso, Tex., Tucson, Ariz., and San Diego, Calif., on the south, Los Angeles and San Francisco, Calif., Portland, Oreg., and Seattle, Wash., on the (533) west, and Salt Lake City, Utah, Billings, Mont., Omaha, Nebr., Chicago, Ill., and Cleveland, Ohio, on the north.

Virginia Stage's corporate history, organization, affiliation, and operations are set forth in *National Trailways Bus System-Control-Trailways,* 75 M.C.C. 179, and the *Tennessee* case, *supra.* It operates between Washington, Richmond, Charlottesville, Lynchburg, and Roanoke, Va., Durham, N. C., Huntington, W. Va., and Cincinnati, Ohio.

Safeway's corporate history, organization, affiliation, and operations are described in *National Trailways Bus*

System-Control-Trailways, supra; Trailways of New England, Inc.-Purchase-Interstate, 93 M.C.C. 217 (the *TNE-Interstate* case), and No. MC-F-8745 *Safeway Trails, Inc.-Purchase-Reading Transp. Co., decided December* 11, 1964 (not printed). It operates between New York City and Washington, via Philadelphia and Baltimore, Md., and between Atlantic City, N. J., and Reading and Lancaster, Pa., via Philadelphia and Wilmington, Del.

Queen's corporate history, organization, affiliation, and operations are described in *Queen City Coach Co. and Smoky Mountain Stages-Control,* 50 M.C.C. 325, and *Queen City Coach Co.-Control-Smoky Mountain Stages,* 70 M.C.C. 77. It operates over routes radiating clockwise from Charlotte to Kingsport and Bristol, Tenn., Hickory, Winston-Salem, Greensboro, Durham, Goldsboro, and Wilmington, N. C., Myrtle Beach and Charleston, S. C., Sylvania and Augusta, Ga., Greenwood and Anderson, S. C., and Asheville, N. C.

TNE, owned jointly by Virginia Stage and Safeway, operates between Portland, Maine, and Berlin and Littleton, N. H., on the north, and New York City, on the south, via Boston and Springfield, Mass., and New Haven, Conn. Tenn T, owned one-third each by Virginia Stage, Smoky, and Continental Tennessee Lines, Inc., (CT) (a subsidiary of Transcon), operates in an area extending from Roanoke and Bluefield, W. Va., to Knoxville, Nashville, and Chattanooga, Tenn., and Atlanta. SCL, jointly controlled by Virginia Stage, Tamiami Trail Tours, Inc., of Tampa (Tamiami), and Carolina Coach Company (CCC), operates primarily in Georgia, serving Gainesville and Albany, on the west, and Augusta, Savannah, and Jacksonville, Fla.,

on the east. Scenic, jointly controlled by Queen and Virginia Stage, operates in an area extending from Asheville, Marion, and Charlotte, N. C., to Orangeburg and Anderson, S. C., and Augusta. Scenic controls Coastal, which operates mainly between Charleston, on the one (534) hand, and, on the other, Myrtle Beach, Camden, and Orangeburg, S. C., and Gray, which provides a sightseeing service in the Charleston area.

WEC, controlled by Claude A. Jessup and other members of the Jessup family, is a noncarrier owning certain real property which it leases to Virginia Stage. Smoky, controlled jointly by Transcon and Queen, serves an area bounded generally by Asheville and Greenville, S. C., Augusta, Athens, and Atlanta, Ga., and Chattanooga, Sweetwater, Knoxville, and Newport, Tenn. Bragg, controlled by Queen, operates between Fayetteville and Fort Bragg, N. C. GRIC, a noncarrier, having some stockholdlers in common with Queen, is an insurance company and owner of real property used by Queen and its subsidiaries. Ga-Fla, owned two-thirds by Bragg and one-third by GRIC, operates between Augusta and Lake City, Fla., via Waynesboro, Midville, Dublin, and Douglas, Ga., and between Waynesboro and Wadley, Ga.

Virginia Stage is the sole stockholder of Allentown and Reading Transit Co. (ART), Safeway Transit Co. (ST), Safety Motor Transit Co. (SM), and Lynchburg Transit Co. (LT), which provide local transit service in Allentown, Pa., Wilmington, N. C., and Roanoke and Lynchburg, Va., respectively. Trailways Service, Inc. (TS), and Trailways Terminal of Washington (TT), are garage and terminal

facilities located in Washington, whose stock is jointly owned by Virginia Stage and Safeway. The former and CCC jointly own Trailways Bus Terminal, Inc. (TB), a Richmond, Va., passenger terminal. Trailways Garage of Philadelphia (TG) is a garage facility in that city owned by Safeway.

Queen, CCC, and GRIC, respectively, own 50, 25, and 25 percent of the capital stock of Charlotte Union Bus Station, Inc. (CU), a joint passenger station in Charlotte. Asheville Union Bus Station, Inc. (AU), is a joint passenger terminal in Asheville, whose capital stock is held 45, 45, and 10 percent by Queen, Smoky, and Scenic, respectively. Trailways Bus Depot of Atlanta, Inc. (TA), a joint passenger facility in Atlanta, is owned one-third each by Smoky, Tamiami, and Continental Crescent Lines, Inc., the last being wholly owned by Transcon. Queen and Tenn T each own 50 percent of Bristol Trailways Bus Station, Inc. (BT), a joint passenger facility in Bristol.

The Agreements

Under a tripartite agreement dated March 26, 1964, Transcon would exchange .85 of a share of its stock for each share of (535) Virginia Stage's stock and 273.85 shares and 2.5 shares, respectively, of its stock for each share of WEC's common and preferred stock. Stockholders of Virginia Stage and WEC may become a party to the agreement by delivering within a stated period an appropriate letter to a named bank which is serving as a depositary and their shares in proper form for transfer. The de-

positary would issue a receipt corresponding to the number of shares delivered. The underlying shares may not be withdrawn except upon the termination of the agreement or entry of final orders by appropriate regulatory bodies either approving or denying the applications. Until transfer of the stock to Transcon, the holders of the receipts would have all voting and dividend rights. Generally, Virginia Stage and WEC, or their subsidiaries, are not to perform any act or enter into any transaction outside the ordinary course of business, and Transcon is not to declare or pay any dividend on its common stock, perform any act, or enter into any agreement which will substantially dilute the value of such stock.

Under another agreement, dated April 22, 1964, Transcon would exchange .36 of a share of its stock for each share of Safeway's classes A and B capital stock. In most other respects, the two exchange agreements are basically the same. Nearly all of the involved stock has been deposited in escrow.

Under separate agreements dated May 16, 1964, there would be an exchange of 7.25 shares of Transcon's stock for each share of the stock of Queen and GRIC. The remaining terms are essentially the same as those in the Transcon-Virginia Stage agreement. All of the involved stock has been placed in escrow. Internal Revenue Service has ruled that no gain or loss for tax purposes will be recognized as a result of the exchange of the stock of Virginia Stage, WEC, Safeway, Queen, and GRIC for that of Transcon.

Queen's board of directors also has approved employment contracts with L. A. Love, president, and W. E.

Smith, chairman of the board, as noted in the report of the examiner. We agree with the examiner that there is no basis for a conclusion that these contracts are intended as indirect devices for increasing the consideration offered for the sellers' capital stock. Compare *Dealers Transit, Inc.—Control and Merger.* 87 M.C.C. 571.

ISSUES ON EXCEPTIONS

(536) The examiner recommended that the section 5 applications be granted, with the condition that jurisdiction shall be reserved for a period of 3 years for the protection of employees of applicant and its affiliated companies. He found, among other things, that Investors' alleged purchase of Queen's capital stock and the claimed advantages to itself and the public may not properly be considered in the absence of an appropriate application; that there is no law requiring the Commission to develop for the record economic material as to the competitive structure in the industry; that the Commission need accord weight to antitrust policy in a section 5(2) proceeding only if the proposed merger may substantially lessen competition or tend to create a monopoly; that no monopoly would emerge from approval of the instant transactions; that in competion for motor carrier for-hire operations, Greyhound is, and will remain, after approval of the transactions, the giant of intercity bus transportation; that the matter of Investors' attempt to purchase Queen's capital stock is a dispute between such parties for settlement between themselves or in the court; that the Commission is required to determine the instant applications on their merits; that

the depositary receipts are subject to the terms of the related agreements and the number thereof sold does not affect the control of Queen and GRIC; and that although in October 1963, Transcon purchased 21 percent of Safeway's stock, the facts of record do not warrant a finding that Transcon thereby acquired the power to exercise control or management of Safeway's operations.

He further recommended, in Finance Docket Nos. 23123 and 23159, that Transcon be authorized to issue not exceeding 590,347 shares and 217,296 shares of common capital stock, respectively, having found that since certain of the shares of stock sought to be issued by Transcon would be immediately thereafter surrendered for cancellation, there was no need for the issuance of such stock.

Transcon contends that the number of shares of stock it should be authorized to issue should be modified. In Finance Docket No. 23123, it alleges that, contrary to the examiner's conclusions, issuance to WEC and Virginia Stage of 144,347 and 89,964 shares, respectively, although ultimately to be returned to Transcon for cancellation, has a definite and integral place in the transaction. It states that each of the stock trades, by contract, contemplates (537) a tax-free trade; that at least 80 percent of the stockholders of each class of stock must participate; that it is impossible to obtain such percentage of participation, insofar as Virginia Stage and/or Safeway is concerned, without actually issuing and trading the said 234,311 shares; and that the tax rulings require that these shares be issued and traded in order for the tax advantage to exist. In Finance Docket No. 23159, Transcon admits that although the tax ruling will not be defeated in the event it is not authorized

to issue the 1,160 shares of stock to Queen in return for stock in GRIC, since 80 percent of each class of stock is obtainable, it has been represented to the Internal Revenue Service that the transaction will be handled in that manner. Transcon therefore renews its request for such authority in full.

In its exceptions and motion, Greyhound contends that the recommended decision of the examiner in the instant proceedings is so diametrically opposed to the decision of division 3 in the *Greyhound* case as to demand that the proceedings be consolidated for determination by the entire Commission; that the Commission cannot apply different standards of proof for different applicants; and that the examiner erred in his evaluation of the evidence herein and in failing to make a determination respecting the unlawful control aspects of these proceedings. Greyhound fears that approval will mean that Transcon will control most North Carolina bus terminals under the terms of a State law relating to joint terminals at all points of joint service, thus diverting traffic from Greyhound to Trailways more than at present because Transcon offers almost nationwide service.

Investors contends that the examiner has made findings which are not based upon reliable, probative and substantial evidence; that Transcon has consummated purchases of stock without authorization from the Commission and in violation of the Clayton Act; that the examiner failed to pass on the legality of the sale of the depositary receipts issued for Queen and GRIC stock to affiliates of Transcon, or to list Transcon as a principal stockholder thereof; that the examiner failed to find that Transcon

had concealed an important fact from the Commission in not disclosing that it had purchased Eastern Carolina Corporation; that the Commission has concealed from the examiner information developed in an investigation of Transcon; that purchases of depositary receipts for stock were unlawful; that the examiner erred in not requiring audited income statements from GRIC; that the examiner failed to recognize that the instant trans- (538) actions are within the scope of a transaction posed by Investors which the Commission's Bureau of Finance ruled would not be permitted; that the Commission would abuse discretion granted by the Congress if, without a compelling transportation requirement, it created a duopoly on a national scale in the bus industry; that the Commission must dispose of issues relating to perjury by Transcon's witnesses and conspiracy to conceal violations of the Clayton Act prior to passing on the merits of the instant transactions; that the findings of the examiner are fatally defective and must be set aside in the absence of a decision concerning violations of the Clayton Act; and that reliability and adequacy of the information on which Commission decisions are to be based requires extraordinary care to protect the public interest. Investors requests oral argument and that the Commission, on its own motion, designate these proceedings as involving issues of general transportation importance.

In his petition, Hamish Turner, the former controlling stockholder of Scenic, alleges that the latter withdrew its protest in these proceedings after certain representations by Queen and Virginia Stage; that attached to the contract for the sale of stock to Queen and Virginia Stage,

was a promissory note for most of the purchase price; that petitioner consummated the sale of his stock[4] with the understanding that Queen and Virginia Stage would give him a negotiable promissory note for most of the purchase price, with the balance to be paid in cash and a second promissory note, which was to be non-negotiable; that Queen and Virginia Stage have refused to issue him the negotiable promissory note, and to release to him the stock of Carolina Insurance and Investment Company owned by Scenic and not included in the sale to Queen and Virginia Stage; that petitioner intends to file a petition to reopen the proceeding in No. MC-F-8648;[5] and that because such petition might result in denying Queen and Virginia Stage authority to control Scenic and its subsidiaries, he files exceptions to that part of the examiner's report herein authorizing Transcon to acquire control of Scenic from Queen and Virginia Stage.

In reply, applicants contend that Investors' exceptions are not in conformity with rule 1.15 of the General Rules of Practice;[6] (539) that the facts in the instant transactions and the Greyhound case are dissimilar, and the Commission is capable of separately weighing the evidence in each case, determining the applicable law and rendering just decisions; and that the different result in the two cases stems not from the application of conflicting criteria, but

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[4] Pursuant to No. MC-F-8648, *Eastern Trailway, Inc.—Control —Carolina Scenic Stages*, 97 M.C.C. 469, Queen and Virginia Stage were authorized to acquire joint control of Scenic. The transaction was consummated October 23, 1964.

[5] No such petition had been filed as of July 8, 1966.

[6] The exceptions substantially conform to the requirements of the rule.

rather from the application of the same criteria to conflicting factual situations.

Applicants further contend that there is no evidence of record that Transcon and its related companies have acquired sufficient stock of Queen, Virginia Stage, and Safeway to control those carriers; that the statements concerning the percentages of stock involved has been considered by the Commission; and that there is no merit to protestants' contention of unlawful control. They argue that the Commission is not the proper forum to determine the bus terminal situation in North Carolina; but assuming it is, Greyhound has failed to point to any probative evidence of record supporting the effect on it as relates to operations out of those terminals. On the larger competitive issues, applicants state that the examiner has properly concluded that Greyhound constitutes a virtual monopoly in the bus industry; that Transcon and its subsidiaries will be substantially strengthened by virtue of these transactions so that new and additional competition will be created; that approval of these transactions would tend to result in the creation of a duopoly; that the proposed combination of the carriers herein would be sufficiently strong to withstand the predatory competitive practices of Greyhound, albeit that after consummation, one member of the so-called duopoly would be less than one-third the size of the other; that it is more realistic to create a duopoly in an effort to get some semblance of nationwide competition with Greyhound than to disrupt the present transactions in favor of would-be entrants into the bus industry and the creation of a "third force;" that Investors' arguments against a duopoly are based on

cases which have been decided solely under the antitrust laws and have no applicability to mergers and acquisitions under the jurisdiction of the Commission; and that Investors was present at the hearing and was at liberty to produce any evidence it considered to be more informative than that which was provided by Transcon.

Applicants further state that the percentage of depositary receipts sold to Highway Insurance Company of Zug, Switzerland (Highway), represents slightly less than 10 percent of the stock of Queen, slightly less than 15 percent of the stock of GRIC, and (540) slightly less than 2 percent of the stock of Virginia Stage; that Highway is a wholly owned subsidiary of Western Sales, Ltd. (Western), or which Transcon owns 49 percent; that neither Western nor Highway is controlled by Transcon;[7] that the latter and M. E. Moore are not privy to the sale of the depositary receipts to Highway; that based upon the purchase by Highway of the depositary receipts, Investors has raised the question of violation of section 7 of the Clayton Act in three different forms, whereas as a matter of law there has been no violation of the Clayton Act; that the Commission is the only body with jurisdiction to decide what effect, if any, the proposed transactions will have upon competition; that there can be no violation of section 7 of the Clayton Act unless and until the Commission finds that the transactions will reduce or eliminate competition;

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[7] In 1964 the remaining 51 percent of the capital stock of Western was distriubted to some 2,800 stockholders of Transcon. Highway is a wholly owned subsidiary of Western. In our opinion, a presumption is warranted that Transcon controls Western and Highway. See *Lease Plan International Corp.—Control—National,* 93 M.C.C. 173, 180 ff.

that the examiner has found that the proposed transactions will create new competition rather than reduce competition; and that Investors' allegation that the transactions will reduce competition is based upon matters outside the record.

Applicants contend that since the stock for which the depositary receipts stand is exempt from the jurisdiction of the Securities and Exchange Commission (SEC), insofar as issuance is concerned, the depositary receipts are likewise exempt; that since the SEC declined to intervene herein, it is proper to conclude that it does not consider the depositary receipts to have been illegally sold; that there is no evidence of record that Transcon made any arrangement or agreement with any stockholder of Queen, GRIC, Virginia Stage, or any of the other carriers to be acquired, to supply cash for the purchase of the depositary receipts, or to agree that said depositary receipts would be purchased, or to set a price to be paid for them; that, because the Commission's Bureau of Enforcement has not sought to intervene in these proceedings, its investigation of Transcon in connection with the sale of the depositary receipts evidently revealed no improper act; that the examiner is fully aware of the investigation and, presumably its results; that in October 1963, Transcon purchased 21 percent of the outstanding stock of Safeway; and that no depositary receipts issued for the remaining 79 percent of the stock have since been purchased by Transcon, Highway or any other entity or person to Transcon's knowledge.

(541) Applicants aver that the testimony of 11 bus executives who possess a combined experience of 356 years in op-

erating intercity bus companies, of 168 exhibits and 1,285 pages of transcript constitutes the only reliable, probative and substantive evidence upon which the examiner has based his findings; that Queen contracted to purchase Eastern Carolina Corporation, a noncarrier, prior to the Transcon stock trade contract; that Transcon will shoulder the liability, through Queen, in the event these transactions are approved; that the purchase by Queen of Eastern Carolina is not a transaction subject to the jurisdiction of the Commission and there was no thought of concealing information when nothing was said on the record in connection with the purchase; that the earnings figures used to compute the trade ratios for all of the companies involved in these transactions were based upon figures acquired from audited reports; that the fact that some of the profits of GRIC for the year 1963 were realized from sale of real estate is not material, its effect on the trade ratios being *de minimis;* that these proceedings and the transaction posed by Investors for an opinion by the Commission's Bureau of Finance[8] have nothing in common, with the exception of the fact that the stock of Queen and GRIC would be deposited with a bank in either case; that the circumstances under which it would be deposited, however, are entirely different; that the fact certain things have happened in other industries creates no inference that the same thing should occur in the bus industry; that what happens to the competitive situation in the bus industry must be decided by the Commission based upon facts and practical reality that exists in the industry;

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[8] Such opinion would not be binding on the Commission anyhow.

and that there is nothing in the record to show that the competitive situation in the broadcast industry or the airline industry or any other industry is in any way comparable to the competitive situation in the bus industry.

They also contend that Turner's petition to intervene is untimely filed and states no compelling reason why he should be made a party intervener in these proceedings; and that the proceeding in No. MC-F-8648 is the proper forum in which Turner should resolve his dispute with Queen and Virginia Stage.

Discussion and Conclusions

At the hearing herein, the examiner granted Transcon's motion to add Seenic, Coastal and Gray as carriers of which Transcon (542) would acquire indirect control.[9] Identical amendments, however, were filed in both section-5 proceedings. Accordingly, the titled application, to the extent of the amendment, will be dismissed. Tenn T, having been included as a subject carrier in both proceedings, the application in No. MC-F-8774 will be dismissed as to it. The motion of Transcon to dismiss the application in No. MC-F-8744, insofar as authority is sought therein to acquire control of SCL and WEC also will be granted as only a third interest in the stock of the former would be acquired and the latter is not a carrier. The applica-

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[9] In *Eastern Trailways, Inc.—Control—Carolina Scenic Stages, supra,* Queen and Virginia Stage were authorized to acquire joint control of Scenic, and, in turn, of Coastal and Gray, through purchase of capital stock.

tion in No. MC-F-8774 also will be dismissed as to GRIC, as it is a noncarrier.

These proceedings could be consolidated with the *Greyhound* case if we could find that such action would best conduce to the proper dispatch of business and to the ends of justice. (Interstate Commerce Act, section 17.) In our opinion, there is no similarity or relationship between the instant proceedings and the *Greyhound* case. The former involves principally the acquisition by Transcon of control of three carriers and their affiliates operating along the eastern Seaboard, and the latter involves acquisitions by Grayhound and affiliates in the West. The proceedings involve different applicants, separate records have been established in each case, and each must be considered on its merits. In doing so separately, no difficulty should be experienced in evaluating the evidence, determining the applicable law and reaching proper decisions. Too, the proceedings are in different stages. We conclude that to disturb the procedural process by consolidating them at this time would not conduce to the proper dispatch of business and to the ends of justice. Accordingly, Greyhound's motion will be denied.

Investors' request for oral argument also will be denied. The facts relating to these transactions are of record herein, have been thoroughly argued by applicants and protestants in briefs, exceptions and various other pleadings, and we conclude that oral argument is unnecessary to a proper determination of the issues.

The outstanding common capital stock of the several carriers sought to be acquired herein has been deposited with certain banks, for which depositary receipts were

issued to the stockholders. Certain of the depositary receipts have been purchased (543) by Highway, which is authorized to write all types of insurance outside of Switzerland. Highway owns slightly less than 10 percent of the outstanding stock of Queen, slightly less than 15 percent of the outstanding stock of GRIC, and some what less than 2 percent of the outstanding stock of Virginia Stage. The stock of Highway is owned by Western, a designer and seller of busses, with 49 percent of the stock of Western owned by Transcon. In October 1963 Transcon purchased 21 percent of Safeway's stock. However, in our opinion, the facts of record do not warrant a finding that Transcon has acquired control of Virginia Stage, Safeway, Queen and GRIC, or the power to exercise control or management of their operations.[10] Nor is the purchase of the depositary receipts a partial consummation of the transactions, which are based on an exchange of shares of Transcon's stock for shares of stock of the carriers to be acquired.

The contention of Greyhound that different criteria have been applied in the *Greyhound* case and the instant cases has been rendered moot by our subsequent action reopening *Greyhound* for reconsideration on the present record. No final decision has yet been reached in that matter.

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[10] On November 23, 1965, in No. MC-F-9165, a complaint and request for investigation filed by Greyhound, alleging premature control by Transcon of Queen, Virginia Stage, and Safeway without prior approval under section 5(2) of the act, was dismissed as to the complaint and denied as to the request for investigation. Investors' petition for reconsideration is being denied concurrently herewith.

Appendix B

Greyhound's contention that the establishment of another single-line operation between Main and Florida would, because of the North Carolina terminal problem, enable Transcon to divert from Greyhound long-haul traffic, in our opinion, is without merit. We agree with the examiner that Greyhound has not adduced any evidence by which to measure the actual or potential loss of revenue, even assuming it were operating at a disadvantage because of the terminal problem. We doubt that the acquired carriers will divert any more interline traffic to Transcon upon it becoming their corporate parent than they formerly did when Transcon was only a fellow member of NTB.

Investors takes the position that the examiner erred in failing to apply the criteria set forth in the Clayton Act to determine the effect the instant transactions will have on competition in the bus industry. Investors apparently relies upon the decision of a three-judge court in *Florida East Coast Railway,* 242 Fed. Supp. 14, 22 (544) (1965), which has been vacated and remanded to that court[11] by the Supreme Court of the United States (*Seaboard Air Line R. Co.* v. *United States,* 382 U.S. 154, 86 S. Ct. 277, 278). In its per curiam decision, the Supreme Court stated (footnote omitted):

> • • •By thus disposing of the case, the District Court did not reach the ultimate question whether the mer-

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[11] By a decision of June 8, 1966, after the remand, the said court sustained the decision of the Commission in *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line,* 320 I.C.C. 122 (1963), the *Seaboard* case. An appeal has been taken on grounds not pertinent herein.

ger would be consistent with the public interest despite the foreseeable injury to competition.

We believe that the District Court erred in its interpretation of the directions this Court set forth in *McLean Trucking Co.* v. *United States,* 32 U.S. 67 (1944), and *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U.S., 173 (1959). As we said in Minneapolis, at 186:

> 'Although section 5(11) does not authorize the Commission to "ignore" the antitrust laws, *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 80, there can be "little doubt that the Commission is not to measure proposals for [acquisitions] by the standard of the antitrust laws." 321 U.S., at 85-86. The problem is one of accommodation of section 5(2) and the antitrust legislation. The Commission remains obligated to "estimate the scope and appraise the effects of the curtailment of competition which will result from the proposal [acquisition] and consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the overall transportation policy." 321 U.S., at 87.'

The same criteria should be applied here to the proposed merger. It matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings in

accordance with the criteria quoted above that such a merger would be consistent with the public interest.' 54 Stat. 908, 49 U.S.C. section 5(2)(b) (1964 ed.).

Based upon the foregoing, it is clear that while the policy underlying the antitrust laws cannot be disregarded,[12] the Congress generally has immunized carrier acquisitions and mergers (545) from the purview of the Clayton Act and intended that the Commission exercise its expertise in determining the competitive effect of any carrier merger or acquisition and whether the proposal would be consistent with the public interest. The Commission is not bound by any criteria laid down under the Clayton Act, even where it may find that a certain merger or acquisition actually will result in reduction of competition. We

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[12] In the *Seaboard* case, on pages 128 and 129, the Commission stated:

The congressional purpose in enacting section 5(2) was to facilitate mergers and consolidations in the national transportation system. *Maintenance Employees* v. *United States*, 366 U.S. 169, 172, 173 (1961). In administering section 5(2), we are not to "measure proposals for all-rail or all-motor consolidations by the standards of the anti-trust laws." *McLean Trucking Co.* v. *United States, supra*, at 84-85. However, we may not disregard the policy underlying the antitrust laws even though carriers participating in a merger are relieved by section 5(11) from the operation of such laws. *Minneapolis & St. L. R. Co.* v. *United States, supra*. Our primary task is to reconcile the objective of "preventing injurious waste and in securing more efficient transportation service," *New York Central Securities Corp.* v. *United States, supra*, at 26, with the general concern of Congress "that tendencies toward concentration in industry are to be curbed in their incipiency, particularly when those tendencies are being accelerated through giant steps strung across a hundred cities at a time." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 346 (1962). In short, our "problem is one of accommodation of section 5(2) and the antitrust legislation." *Minneapolis & St. L. R. Co.* v. *United States, supra*, at 186.

may still find that other factors in the public interest outweigh and override the reduction of competition in a given instance. The examiner, in our opinion, did not err in failing to apply in these proceedings those criteria set forth under the Clayton Act.

Mergers, acquisitions, or consolidations are not unlawful or improper *per se,* and conflict with the antitrust laws only where they might result in a substantial lessening of competition or tend toward the creation of a monopoly. In passing on a voluntary consolidation or merger of motor carriers we are only required to look for standards prescribed by section 5(2)(c) of the Interstate Commerce Act. The primary test to be met here is whether the merger or consolidation will be compatible with the public interest. Although we are required to make a determination with respect to the competitive effect of such transactions in considering the question of public interest, the size or strength of the carriers involved or whether they are competitive or noncompetitive is not determinative. The term "public interest," as stated in *New York Central Securities Co.* v. *United States,* 287 U.S. 12, 25 (1932), has a direct relation to the adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities. These are the criteria.

Here, the proposed transactions will not result in a reduction of competition, but will substantially increase competition, which factor is pointed out in the report of the examiner. While there (546) is some duplication in operations of Transcon and the carriers involved in the proceedings herein, essentially between Washington, D. C., and

Baltimore, Md., Philadelphia, Pa., and New York, N. Y., and to some extent between Tenn T and CT in Tennessee comprising, at most, some 350 miles of a total of 10,860 miles operated by the carriers to be controlled, or about 3.5 percent, there is virtually no duplication in service provided. The carriers to be controlled now provide through service between points in their respective areas under interline arrangements and Transcon and the subject carriers have cooperated closely for many years as NTB members. Centralized control of the various operations in Transcon would permit the establishment of more through services and improved service all to the benefit of the public. Assuming *arguendo,* as does the examiner, that even though some reduction in competition might result, the record is clear that the other benefits which would flow from approval herein would be in the public interest and override any effect from such decrease in competition.

Investors argues that it would create a "third force" to compete with Greyhound and Transcon. Its ability to do this is doubtful at best. However, no application has been filed for the consolidation of any of the several carriers herein involved under the ownership of Investors for the creation of such "third force." Investors, by comparing the situation in the bus industry to that existing in other industries, fails to realize the peculiarities of the competitive problem resulting from the fact that bus companies must operate over specific authorized routes and between specified points. Regardless of whether a pattern may have been established in other industries that there shall be not less than three major competitors, and where the area served may depend upon depth of the sales staff, no

such pattern has been established for the bus industry. In administering the act, the question is consistency with the public interest, and whether the public convenience would be served. Will the transaction enable the involved applicant to provide an improved service by motor vehicle to the advantage of the riding public and not thereby unduly restrain competition? The public desires bus service from a single terminal to almost any destination and carriers which can be relied upon for reasonable reliability, cleanliness, safety, frequency of schedules, and (547) adequate terminal facilities. Greyhound and Trailways (NTB) have satisfied this demand. Many independent bus companies have not.

Assuming *arguendo* that Greyhound and Trailways (NTB), constitute a duopoly already, these applications portend nothing new for they involve primarily a strengthening of the Trailways system. While the Trailways system today is neither a single company nor a single group of related companies, it is already dominated by Transcon and its affiliates.

To finance the transactions in No. MC-F-8744, Transcon seeks to issue 824,158 shares of its authorized common stock for the participating stockholders' shares, apportioned as follows:

Company	*Outstanding shares*	*Transcon shares*
Virginia Stage	393,650	334,603
WEC (preferred)	1,219	3,048
WEC (common	791	188,139
Safeway (class A and B)	1,050,000[1]	298,368

[1] Includes a total of 221,200 shares of class A and B stock owned by Transcon.

Appendix B

WEC owns 169,820 shares of Virginia Stage's stock for which it would receive 144,347 shares of Transcon stock. Virginia Stage owns 249,900 shares of Safeway's stock for which it would receive 89,964 Transcon shares. The examiner was of the opinion that since the 234,311 shares which WEC and Virginia Stage would acquire would be returned to Transcon's treasury for cancellation, there was no need to issue more than 590,347 shares, including 500 shares to cover any fractional shares that might be required to be issued to the participating stockholders. As above indicated, applicant contends that each of the stock trades contemplates a tax free trade; that in order to have such a trade under the rules of the Internal Revenue Service, at least 80 percent of the stockholders of each class of stock must participate; that it is impossible to obtain such participation without actually issuing and trading the 234,311 shares; and that the tax rulings require that these shares be issued and traded in order for them to be operative.

To finance the transactions in No. MC-F-8774, Transcon would issue 161,414 shares of its stock for the 22,264 shares of Queen's (548) stock and 57,942 shares for the 7,992 shares of GRIC's stock, or a total of 219,356 new shares. The examiner was of the opinion that since the 1,160 Transcon shares Queen would receive for its 160 shares, of GRIC stock, together with 1,000 shares of Transcon stock owned by Queen would be returned to Transcon's treasury for cancellation, there was no need to issue more than 217,296 shares including 100 shares to cover any fractional shares that might be required to be issued to the

participating stockholders. As above indicated, applicant contends that although the tax ruling will not be defeated in the event Transcon is not authorized to issue the 1,160 shares of stock to Queen, since 80 percent of each class of stock may be obtained, representation has been made to the Internal Revenue Service that the transaction will be handled in that manner. While we deem the representation inmaterial considering the limited number of shares involved, we will authorize issuance of the number of shares sought.

Accordingly, authority will be granted in Finance Dockets Nos. 23123 and 23159 for Transcon to issue not exceeding 824,658 shares and 219,456 shares of its common stock, respectively, the former including 500 shares and the latter 100 shares to cover any fractional shares to which the participating stockholders might be entitled because of the trade ratios. Such is on the condition, however, that the 236,411 shares to be issued to WEC, Virginia Stage, and Queen will, as proposed, be returned to Transcon's treasury.

Investors' petition requesting that it be permitted to file certain late-filed exhibits and other relief and its motion that certain additional data be considered in conjunction with said petition, will be denied under rule 86 of the General Rules of Practice.[13] To accept and consider such late-filed exhibits and additional data, in the absence of a stipulation that same might be filed, would be deprivation of the

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[13] Rule 86 reads, in part, as follows: "* * * the Commission will not receive in evidence or consider as part of the record any documents, letters, or other writings submitted for consideration in connection with any proceeding after close of the hearing, * * *."

right of applicants to cross examination thereon. *Standard Motor Freight, Inc.—Purchase—Madison Transp.*, 65 M.C.C. 249. Furthermore, it does not appear that such additional evidence would affect our conclusions herein.

The averments in the petition of Turner are not reasonably pertinent to the issues presented herein and the petition will be denied. The dispute between Turner and Queen and Virginia Stage is a matter which properly should be resolved in the courts.

(549) No fixed charges would be incurred in these transactions since only an exchange of stock is involved. Our findings contemplate that the reservation of jurisdiction for carrier-employee protection satisfies the requirements of section 5(2)(c)(4).

It has been a consistent policy in section-5 proceedings to encourage the unification of the properties of carriers under common control in order to foster efficiency and to lessen wasteful transportation in furtherance of the national transportation policy. While it is Transcon's present intention to maintain the subject carriers as separate corporate entities with the same management, Transcon is admonished to give consideration to a plan for corporate simplification of the multiple common carriers which will be controlled by it, with a view toward seeking authority for unification of the operations into a lesser number of carriers. See the *Tennessee* case at page 780. Absent such a plan, future control applications by Transcon may be disapproved.

In No. MC-F-8744, we find that acquisition by Transcontinental Bus System, Inc., of control of Virginia Stage

Lines, Incorporated, and Safeway Trails, Inc., through purchase of their outstanding capital stock, and, in turn, of Trailways of New England, Inc., and Tennessee Trailways, Inc., through such acquisition of control, upon the terms and conditions previously set forth, which terms and conditions are found to be just and reasonable, constitute transactions within the scope of section 5(2)(a), and will be consistent with the public interest; provided, however, that if the authority herein granted is exercised, jurisdiction shall be reserved for a period of 3 years from the date of final consummation herein to make such additional findings and to impose such terms and conditions with respect to the employees of applicant and its affiliated companies as may be necessary and lawful, if, upon petition by them, or their representatives, within that period, it is shown that the condition of their employment or interests incident thereto have been or will be adversely affected by anything done or proposed to be done pursuant to, or as a direct result of, consummation of the transactions under the authority herein granted.

In No. MC-F-8744, we further find that to the extent Service Coach Line, Inc., Carolina Scenic Stages, Coastal Stages Corporation, The Gray Line of Charleston, and Water Street Equity Corporation are joint parties applicant, the application should be dismissed.

(550) In No. MC-F-8774, we find that acquisition by Transcontinental Bus System, Inc., of control of Queen City Coach Company through purchase of its outstanding capital stock, and, in turn, of Smoky Mountain Stages, Inc., Georgia-Florida Coaches, Inc., Fort Bragg Coach Company, Inc., and Carolina Scenic Stages, and, in turn,

of Coastal Stages Corporation and The Gray Line of Charleston through such acquisition of control, upon the terms and conditions previously set forth, which terms and conditions are found to be just and reasonable, constitutes a transaction within the scope of section 5(2)(a), and will be consistent with the public interest; provided, however, that, if the authority herein granted is exercised, jurisdiction shall be reserved for a period of 3 years from the date of final consummation herein to make such additional findings and to impose such terms and conditions with respect to the employees of applicant and its affiliated companies as may be necessary and lawful, if, upon petition by them, or their representative, within that period, it is shown that the condition of their employment or interests incident thereto have been or will be adversely affected by anything done or proposed to be done pursuant to, or as a direct result of, consummation of the transaction under the authority herein granted.

In No. MC-F-8774, we further find that to the extent Tennessee Trailways, Inc., and General Realty and Insurance Corporation are joint parties applicant, the application should be dismissed.

In Finance Dockets Nos. 23123 and 23159, we find that issuance by Transcontinental Bus System, Inc., in connection with the transactions authorized in Nos. MC-F-8744 and MC-F-8774, of not exceeding 824,658 shares and 219,456 shares of its common capital stock, $1 par value each, respectively, upon the terms and conditions and for the purposes previously set forth, (a) is for a lawful object within its corporate purposes and compatible with the public interest, which is necessary and appropriate for and

consistent with the proper performance by Transcontinental Bus System, Inc., of service to the public as a common carrier, and which will not impair its ability to perform that service and (b) is reasonably necessary and appropriate for such purposes.

An appropriate order will be entered.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 10th day of August 1966.

No. MC-F-8744

TRANSCONTINENTAL BUS SYSTEM, INC.—CONTROL—
VIRGINIA STAGE LINES, INC.

No. MC-F-8774

TRANSCONTINENTAL BUS SYSTEM, INC.—CONTROL—
QUEEN CITY COACH CO.

Finance Docket No. 23123

TRANSCONTINENTAL BUS SYSTEM, INC.—STOCK

Finance Docket No. 23159

TRANSCONTINENTAL BUS SYSTEM, INC.—STOCK

Investigation of the matters and things involved in these proceedings having been made, and the Commission, on the date hereof, having made and filed a report containing

its findings of fact and conclusions thereon, which report and the report of the examiner are hereby made a part hereof:

It is ordered, That, in No. MC-F-8744, the acquisition by Transcontinental Bus System, Inc., of Dollars, Tex., of control of Virginia Stage Lines, Incorporated, of Charlottesville, Va., and Safeway Trails, Inc., of Washington, D. C., through purchase of their outstanding capital stock, and, in turn, of Trailways of New England, Inc., of Washington, and Tennessee Trailways, Inc., of Knoxville, Tenn., through such acquisition of control be, and it is hereby, approved and authorized, subject to the terms and conditions set forth in the report.

It is further ordered, That the application in No. MC-F-8744, to the extent Service Coach Line, Inc., of Tampa, Fla., Carolina Scenic Stages and Coastal Stages Corporation, both of Spartanburg, S. C., The Gray Line of Charleston, of Charleston, S. C., and Water Street Equity Corporation, of Charlottesville, are joint parties applicant be, and it is hereby, dismissed.

It is further order, That, in No. MC-F-8774, the acquisition by Transcontinental Bus System, Inc., of Control of Queen City Coach Company, of Charlotte, N. C., through purchase of its outstanding capital stock, and, in turn, of Smoky Mountain Stages, Inc., Georgia-Florida Coaches, Inc., and Fort Bragg Coach Company, Inc., all of Charlotte, and Carolina Scenic Stages, and, in turn, of Coastal Stages Corporation and The Gray Line of Charleston, through such acquisition of control be, and it is hereby,

approved and authorized, subject to the terms and conditions set forth in the report.

It is further ordered, That the application in No. MC-F-8774, to the extent Tennessee Trailways, Inc., and General Realty and Insurance Corporation, of Charlotte, are joint parties applicant be, and it is hereby, dismissed.

It is further ordered, That, in Finance Dockets Nos. 23123 and 23159, in connection with the transactions authorized in No. MC-F-8744 and MC-F-8774, Transcontinental Bus System, Inc., be, and it is hereby, authorized to issue not exceeding 824,658 and 219,456 shares, respectively, of common capital stock, par value of $1 per share, for the purposes and upon the terms and conditions set forth in said report.

It is further ordered, That if the parties to the transactions authorized in Nos. MC-F-8744 and MC-F-8774 desire to consummate same, they shall confirm in writing to the Commission, immediately after consummation, the dates on which consummation has actually taken place.

It is further ordered, That if the authority herein granted is exercised, Transcontinental Bus System, Inc., shall submit for consideration, in each proceeding, a sworn statement, and one copy thereof, showing all expenditures made, by dates, or to be made, in connection with the transaction authorized, including the consideration, legal and other fees, commissions, witness fees, and any other costs incidental to the transaction, the assets acquired and the liabilities assumed, indicating the account number and

title to which each item has been, or is to be, debited or credited.

It is further ordered, That the authority herein granted shall be effective 35 days from the date of service of this order.

It is further ordered, That unless the authority herein granted is exercised within 180 days from the effective date hereof, this order shall be of no further force and effect.

It is further ordered, That except as herein authorized, the capital stock authorized to be issued in Finance Dockets Nos. 23123 and 23159, shall not be sold, pledged, repledged, or otherwise disposed of by Transcontinental Bus System, Inc., unless and until so ordered or approved by this Commission.

It is further ordered, That Transcontinental Bus System, Inc., shall report concerning the matters involved in Finance Dockets Nos. 23123 and 23159 in conformity with the order of the Commission, Division 3, dated May 20, 1964, as amended, respecting applications filed under section 214 of the Interstate Commerce Act (49 CFR 56.6).

It is further ordered, That nothing herein shall be construed to imply any guarantee or obligation as to said stock, or dividend thereon, on the part of the United States.

It is further ordered, That recital in said reports of balance sheet and other financial data shall not be con-

strued as approving accounting methods which have been followed or expenditures represented thereby.

It is further ordered, That the motion of Greyhound Lines, Inc., that the proceedings herein be consolidated with proceedings in Nos. MC-F-8343 and MC-F-8438 be, and is hereby, denied.

It is further ordered, That the request of Interstate Investors, Inc., for oral argument, be, and it is hereby, denied; and,

It is further ordered, That the petition of Interstate Investors, Inc., requesting that it be permitted to file certain later-filed exhibits and for other relief, and its motion that certain additional data be considered in conjunction with said petition be, and they are hereby, denied.

By the Commission.

H. NEIL GARSON,
Secretary.

(Seal)

APPENDIX C

INTERSTATE COMMERCE COMMISSION

Served November 1, 1965

No. MC-F-8744[1]

TRANSCONTINENTAL BUS SYSTEM, INC.—CONTROL—
VIRGINIA STAGE LINES, INC.

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(2) REPORT AND ORDER

RECOMMENDED BY M. L. WINSON, HEARING EXAMINER

INTRODUCTION

Transcontinental Bus System, Inc., of Dallas, Tex., by an application filed on May 7, 1964, in No. MC-F-8744, as amended and supplemented, seeks authority under section 5 of the Interstate Commerce Act to acquire control of Virginia Stage Lines, Incorporated, of Charlottesville, Va., and Safeway Trails, Inc., of Washington, D. C., through purchase of their outstanding capital stock, for consideration later described and, in turn, of Trailways of New England, Inc., of Washington, Tennessee Trailways, Inc., of Knoxville, Tenn., Service Coach Line, Inc. of Tampa, Fla., Carolina Scenic Stages, of Spartanburg, S. C., and Water

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[1] This report embraces No. MC-F-8774, Transcontinental Bus System, Inc.—Control—Queen City Coach Co., Finance Docket No. 23123, Transcontinental Bus System, Inc.—Stock, and Finance Docket No. 23159, Transcontinental Bus System, Inc.—Stock.

Street Equity Corporation, of Charlottesville, and, in turn, of Coastal Stages Corporation, of Spartanburg, and The Gray Line of Charleston, of Charleston, S. C. By another application filed on June 5, 1964, in No. MC-F-8774, as amended and supplemented, Transcontinental Bus System, Inc., seeks similar authority to acquire control of Queen City Coach Company, of Charlotte, N. C., through purchase of its outstanding capital stock, for consideration discussed below, and, in turn, of Smoky Mountain Stages, Inc., Georgia-Florida Coaches, Inc., and Fort Bragg Coach Company, Inc., also of Charlotte, Tennessee Trailways, Inc., Carolina Scenic Stages, and General Realty and Insurance Corporation, of Charlotte, and, in turn, of Coastal Stages Corporation and The Gray Line of Charleston.[2] In applications filed on May 13, and June 5, 1964, in Finance Dockets (3) Nos. 23123 and 23159, Transcon seeks authority under section 214 of the Act to issue 807,043 shares of its common capital stock, $1 par value each, of which 589,847 shares would finance the transactions in No. MC-F-8744 and 217,196 shares those in No. MC-F-8774. No representation has been made by any State authority respecting the section-214 applications.

The four applications were referred to the Examiner for hearing and recommendation of appropriate orders. Such hearing was held on a consolidated record on September 9-15 and October 26-9, 1964, in Washington, at which Greyhound Lines, Inc., and Interstate Investors, Inc., herein called Greyhound and Investors, opposed the applications,

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[2] The above parties, in the sequence named, will be identified as Transcon, Virginia Stage, Safeway, TNE, Tenn T., SCL, Scenic, WEC, Coastal, Gray, Queen, Smoky, Ga-Fla, Bragg, and GRIC.

cross-examined witnesses, and introduced evidence. The Amalgamated Transit Union filed a formal protest thereto, but stipulated of record with Transcon that the employees involved in the transactions would not be adversely affected by their approval, and simultaneously requested the Commission to reserve jurisdiction for a period of three years from the date of consummation for the purpose of protecting the interest of such employees. The findings herein will be appropriately conditioned. See *Transcontinental Bus System, Inc.—Control,* 85 M.C.C. 383. Briefs were filed by Transcon, Virginia Stage and WEC, Safeway and TNE, Queen and GRIC, Greyhound, and Investors. Transcon utilizes considerably more than 20 motor busses in performing transportation under Part II of the Act. Its operating revenues in 1962, 1963, and the first half of 1964 aggregated $13,967,314, $14,452,879, and $6,661,569, respectively. Unless otherwise stated, the parties herein engaged in transportation operate in interstate or foreign commerce as motor common carriers of passengers over regular routes. Certain motions of several parties will be considered at an appropriate place in this report.

Transcontinental's Corporate History, Affiliation, Operations, and Financial Data

Transcon's corporate history, organization, affiliation, and operations are described in *Continental Tenn. Lines, Inc.—Control—Tennessee Coach,* 87 M.C.C. 775, and the case cited therein. It is authorized to issue 4,000,000 shares of common capital stock, par value $1 each, of which 1,981,172 shares are outstanding. There are numerous

stockholders, with the 10 largest holding approximately 42 percent, and none more than 8 percent. In *Transcontinental Bus System, Inc.—Control, supra,* it was found that no single stockholder or group of affiliated stockholders controlled or had the power to control Transcon within the purview of the principle enunciated in *Refiners Transport & Term. Corp.—Purchase—Marshall,* 39 M.C.C. 271, and the same conclusion is warranted here. Approval herein would not materially change this situation. Transcon holds varying proportions of the capital stock of many carriers and non-carries, the latter owning mostly bus terminals and restaurants. It, as well as the subject carriers, is a member of National Trailways Bus System, herein called TBS, which is a voluntary, non-profit membership association of motor common carriers of passengers, (4) formed in 1936 for the purpose of promoting travel over their lines, improving their service, effecting economies in operation, and fostering safety programs and practices, through the establishment of joint terminals, coordination of schedules, transportation of passengers with minimum interchange of busses, joint advertising of services, joint purchase of supplies, and use of common color schemes and trade-marks. *National Trailways Bus System—Control—Trailways,* 75 M.C.C. 179, and *Trailways of New England, Inc.—Pur.—Boston & M. Transp.,* 80 M.C.C. 697. By advertising the name of "Trailways", the members are identified by the public as a group of carriers rendering through service nationally, and thus are better able to compete with Greyhound's nation-wide motorbus operations. Ibid. TBS is currently composed of some 44 carriers, with control and management of its affairs vested in a 14-member

board of directors, 6 representing Transcon and its subsidiaries. Dues and other charges are assessed in proportion to each member's passenger revenue of the last calendar year before election of the board, the portion of the Transcon companies amounting to 46.38 percent. The number of votes depends on such revenue, subject to a maximum limit.

Transcon's operations are divided into three divisions, Continental Central Lines, Continental Dixie Lines, and Continental Western Lines. With 16 subsidiaries (15 wholly controlled and one 50 percent), it operates over 45,575 miles of routes in 36 states, bounded generally by New York, N. Y., Philadelphia, Pa., and Washington, on the east, Atlanta, Ga., New Orleans, La., Brownsville and El Paso, Tex., Tucson, Ariz., and San Diego, Calif., on the south, Los Angeles and San Francisco, Calif., Portland, Ore., and Seattle, Wash., on the west, and Salt Lake City, Utah, Billings, Mont., Omaha, Nebr., Chicago, Ill., and Cleveland, Ohio, on the north. Some of the principal points served, aside from those just named, are Harrisburg and Pittsburgh, Pa., Detroit, Mich., Toledo and Columbus, Ohio, Indianapolis, Ind., Birmingham and Mobile, Ala., Chattanooga, Nashville, and Memphis, Tenn., Shreveport, La., Houston, Dallas, and Fort Worth, Tex., Denver, Colo., Albuquerque, N. M., Little Rock, Ark., Oklahoma City, Okla., St. Louis and Kansas City, Mo., and Des Moines, Iowa. Transcon and its affiliates operate 1,283 busses. It has approximately 4,000 employees.

Transcon's balance sheet as of June 30, 1964, shows assets aggregating $26,275,063, consisting of: Current assets $7,859,273, principally cash $860,717, receivables from asso-

ciated companies $5,788,414, accounts receivable $648,333, and material and supplies $430,073; carrier-operating property, less depreciation, $4,942,649; non-carrier operating property, less depreciation, $155,772; intangible property $106,511; investment securities and advances—associated companies $12,373,171 and other $423,960; special funds $240,000; and deferred debits $173,727. Its liabilities were: Current liabilities $5,993,091, chiefly payables to associated companies $3,480,803, accounts payable $1,083,834, wages payable $260,372, and unredeemed tickets $942,767; long-term debt due within one year $885,519; advances payable $10,580; equipment and other long-term obligations $1,865,972; deferred credits $87,827; (5) reserves $365,178; common capital stock $1,974,072 and premiums thereon $366,670; and surplus—unearned $2,970,214 and earned $11,755,940. Transcon's income statements for 1962, 1963, and the first 6 months of 1964 show net income of $1,082,460 and $4,825,765 and a deficit of $332,704, before and net income of $845,117 and $4,452,034 and a deficit of $272,451 (deduction of investment credit of $60,252) after, provision for income taxes, respectively.

No. MC-F-8744 AND FINANCE DOCKET No. 23123

VIRGINIA STAGE'S AND SAFEWAY'S CORPORATE HISTORY, AFFILIATION, OPERATIONS, AND FINANCIAL DATA

Virginia Stage's corporate history, organization, affiliation, and operations are set forth in *National Trailways Bus System—Control—Trailways, supra,* and No. MC-F-8648, *Eastern Trailways, Inc.—Control—Carolina Scenic*

Stages, —— M.C.C. ——, decided July 17, 1964, and, on reconsideration, September 1, 1964. It has outstanding 393,650 shares of common capital stock, par value $1 each, of which WEC (name changed from The Virginia Pepsi-Cola Bottling Company, Incorporated) owns 169,820 shares (43%), Claude A. Jessup 26,970 shares, James L. Jessup 19,500 shares, and other members of the Jessup family own a large part of the balance. WEC is a non carrier, but has real property which is being used by Virginia Stage. The former's capitalization consists of 1,219 shares of 4 percent cumulative preferred stock, $100 par value each, and 791 shares of common capital stock with a par value of $100 each, a majority of which is owned by members of that family.

Safeway's corporate history, organization, affiliation, and operations are described in *National Trailways Bus System —Control—Trailways, supra, Trailways of New England, Inc.—Purchase—Interstate,* 93 M.C.C. 217, and No. MC-F-8745, *Safeway Trails, Inc.—Purchase—Reading Transp. Co.,* decided December 11, 1964 (not printed in full). It has outstanding 525,000 shares each of Class A non-voting and Class B voting common capital stock, par value $1 each. Ownership of a large majority thereof is divided as follows: Virginia Stage, 124,950 shares of each class, total 23.7 percent, Claude Jessup, 122,500 shares, same, 23.3 percent, Transcon 110,600 shares, same, 21.1 percent, Charles B. McInnis 104,600 and 110,600 shares, 20.5 percent, and Marvin E. Walsh 44,450 and 44,450 shares, 8.5 percent.

Virginia Stage and Safeway jointly own all of TNE's capital stock. Virginia Stage, Continental Tennessee Lines, Inc., of Nashville, a subsidiary of Transcon, and Smoky

each owns 33⅓ percent of Tenn T's stock. Virginia Stage, Tamiami Trail Tours, Inc., of Tampa, and Carolina Coach Company, of Raleigh, N. C., jointly control (⅓ each) SCL. Virginia Stage is the sole stockholder of Allentown and Reading Transit Co., Safeway Transit Co., Safety Motor Transit Co., and Lynchburg Transit Co., which provide transit service in Allentown, Pa., Wilmington, N. C., and Roanoke and Lynchburg, Va., respectively. Trailways Service, Inc., and Trailways Terminal of Washington are garage and terminal facilities located in Washington, whose stock is jointly owned by Virginia Stage and Safeway. The former and CCC jointly own Trailways (6) Bus Terminal, Inc., a Richmond, Va., passenger terminal. Trailways Garage of Philadelphia is a garage facility in that city owned by Safeway. The companies named in this paragraph, and not previously identified, will be called in the order mentioned, CT, Tamiami, CCC, ART, ST, SM, LT, TS, TT, TB, and TG.

Virginia Stage operates between Washington, Richmond, Charlottesville, Lynchburg, and Roanoke, Durham, N. C., Huntington, W. Va., and Cincinnati, Ohio. It has 127 buses and 443 employees. Safeway's operations are between New York City and Washington, via Philadelphia and Baltimore, Md., and between Atlantic City, N. J., and Reading and Lancaster, Pa., via Philadelphia and Wilmington, Del. There are 175 busses and 712 employees in its service. TNE operates between Portland, Me., and Berlin and Littleton, N. H., on the north, and New York City, on the south, via Boston and Springfield, Mass., and New Haven, Conn., with 50 busses and 186 employees. Tenn T's operations extend from Roanoke and Bluefield,

W. Va., southwestward to Knoxville, Nashville, and Chattanooga, Tenn., and Atlanta. It has 56 busses. SCL operates 13 busses primarily in Georgia, serving Gainesville and Albany, on the west, and Augusta, Savannah, and Jacksonville, Fla., on the east.

Virginia Stage's balance sheet as of June 30, 1964, shows assets aggregating $8,014,806, consisting of: Current assets $1,358,566, principally cash $177,798, receivables from associated companies $532,868, and accounts receivable, less reserve for uncollectible accounts, $559,194; carrier-operating property, less depreciation, $4,568,313; non-operating property, less depreciation, $221,026; intangible property, less amortization $60,471; investment securities and advances $1,575,687; prepayments $210,358; and deferred debits $20,385. Its liabilities were: Current liabilities $1,156,163, chiefly accounts payable $451,217, taxes accrued $286,869, and other current liabilities $219,429; long-term debt due within one year $741,471; equipment and other long-term obligations $1,750,942; reserves $38,271; common capital stock $393,650 and premiums thereon $586,887; and earned surplus $3,347,422. Its income statements for 1962, 1963, and the first 6 months of 1964 show net income of $1,013,198, $1,000,293, and $383,528 before, and $563,301, $545,891, and $213,801 after, provision for income taxes, respectively.

Safeway's balance sheet as of June 30, 1964, shows assets aggregating $10,246,493, consisting of: Current assets $1,637,304, principally cash $882,209, receivables from associated companies $225,454, and accounts receivable $454,959; carrier-operating property, less depreciation, $7,902,818; intangible property, less amortization,

$6,090; investment securities and advances $355,427; and deferred debits $344,854. Its liabilities were: Current liabilities $1,520,778, mainly accounts payable $411,183, wages payable $252,665, unredeemed tickets $198,029, taxes accrued $341,728, and other current liabilities $235,430; long-term debt due within one year $870,474; equipment and other long-term obligations $2,089,264; deferred credits $7,174; reserves $52,096; common capital stock—Class A $525,000 and Class B $525,000; and earned surplus $4,656,707. Safeway's income statements for 1962, (7) 1963, and the first 6 months of 1964 show net income of $1,572,688, $1,020,768, and $556,163 before, and $892,930, $682,276, and $314,808 after, provision for income taxes, respectively.

The balance sheet of TNE as of June 30, 1964, shows assets aggregating $2,350,311, including current assets $241,397. Its current liabilities were $457,791 and earned surplus $62,222. Its income statements for 1962, 1963, and the first 6 months of 1964 show a net income of $201,013 and $36,069 and a deficit of $114,728 before, and net income of $189,213 and $33,016 and a deficit of $120,339 after, provision for income taxes, respectively. Tenn T's balance sheet as of June 30, 1964, shows total assets of $1,932,750, including current assets $463,184, and current liabilities of $198,213, with earned surplus of $355,120. Its income statements for 1962 (from January 16), 1963, and the first 6 months of 1964 show net income of $185,694, $226,069, and $128,612 before, and $124,262, $150,363, and $83,995 after, provision for income taxes, respectively. SCL's balance sheet as of December 31, 1963, shows assets aggregating $214,555 and surplus—unearned $46,900 and

earned (debit balance) $33,873. Its income statements for 1962, 1963, and the first 6 months of 1964 show net income of $141,082, $172,147, and $56,171 before, and $124,345, $78,740, and $30,656 after, provision for income taxes, respectively.

WEC's balance sheet as of June 30, 1964, shows assets aggregating $2,759,154, including current assets $34,964. Its current liabilities were $253,405; capital stock—preferred $248,000 and common $79,100; and surplus—unearned $537,467 and earned $1,611,753. WEC's income statements for 1962, 1963, and the first 6 months of 1964 show net income of $305,431, $202,530, and $30,518, respectively, before provision for income taxes. For 1962 and 1963, net income after such provision was $188,984 and $149,131.

ART's balance sheet as of June 30, 1964, shows total assets of $16,109 and earned surplus (debit balance) $70,872. Its income statements for 1962, 1963, and the first 6 months of 1964 show net income of $4,042, a deficit of $2,700, and net income of $337, respectively, before provision for income taxes. ST's balance sheet as of the above date shows assets aggregating $104,761 and earned surplus $22,458. Its income statements for the same periods show deficits of $4,977, $15,142, and $11,876. SM's balance sheet as of that date shows total assets of $596,062 and earned surplus of $283,582. Its income statements for these periods show net income, before provision for income taxes, of $20,396, a deficit of $14,047, and net income of $29,217. LT's balance sheet as of the same date shows assets aggregating $1,122,807 and earned surplus $453,226. Its income statements for the same periods show net income of $48,334,

$47,702, and $36,648 before, and $26,800, $27,252, and $22,212 after, provision for income taxes.

(8) TS's balance sheet as of June 30, 1964, shows assets aggregating $883,948 and earned surplus $354,040. Its income statements for 1962, 1963, and the first 6 months of 1964 show net income of $93,355, $49,825, and $58,079 before, and $49,963, $29,313, and $30,877 after, provision for income taxes, respectively. TT's balance sheet as of the same date shows total assets of $99,499 and capital stock (no surplus) $15,000. Its income statements for the preceding periods show no income or deficits. TB's balance sheet as of that date shows assets aggregating $75,317 and capital stock (no surplus) $40,000. Its income statements for these periods show no income or deficits. TG's balance sheet as of June 30, 1964, shows assets aggregating $267,708 and earned surplus $146,736. Its income statements for 1962, 1963, and the first 6 months of 1964 show net income of $53,356, $17,830, and $25,645 before, and $29,228, $11,905, and $18,582 after, provision for income taxes, respectively.

AGREEMENTS

Under a tripartite agreement executed on March 26, 1964, by Transcon, Virginia Stage, and WEC, providing for the stockholders of the latter two companies to "become parties hereto and become bound," there would be an exchange of .85 of a share of Transcon's capital stock for each share of Virginia Stage stock; 237.85 shares of its stock for one share of WEC's common stock; and 2.5 shares of its stock for each share of WEC's preferred stock.

Appendix C

Transcon warrants that, when the transactions are consummated, its assets will include all wholly and partially owned subsidiaries appearing on its balance sheet embraced in the 1962 annual report to its stockholders. Each Virginia Stage and WEC stockholder may signify his intention of becoming a party to the agreement by delivering within a stated period (1) an appropriate letter to a named bank which is serving as a depositary and (2) his shares in proper form for transfer. The depositary would issue to him a receipt corresponding to the number of shares delivered to it. The underlying shares may not be withdrawn unless (1) the agreement is terminated at the end of the exchange period because of the failure of the holders of at least 80 percent of each class of stock to participate, or (2) entry of orders by appropriate regulatory bodies approving in substance the considered transactions, or (3) entry of such orders finally denying the applications. Until transfer of the stock to Transcon, the holders of the receipts would have all voting and dividend rights. Within 10 days after the last contemplated order of approval has been entered, Transcon would, by notice to the depositary, designate a day not more than 20 days after such entry as the consummation date. The latter would give notice thereof to each holder of a depositary receipt. Transcon, on or before such date, would deliver to it the specified number of shares for the participating stockholders.

Virginia Stage and WEC agree that they and their wholly-owned subsidiaries will not, without the written consent of (9) Transcon, effect any change in their capitalization; pay any dividends except as specifically noted; dis-

tribute their assets to any stockholder; dispose of or acquire substantial assets, except in the ordinary course of business; sell or lease any of their operating authority, or make expenditures therefor for which they are not committed on the date of the agreement; fail to maintain their property in good order, allowing for reasonable wear and tear resulting from normal operations and losses from fire, theft, collision, or other casualty; fail to maintain their present or comparable insurance coverage; incur any indebtedness other than equipment obligations and current indebtedness in the ordinary course of business; permit encumbrances on operating property except equipment obligations; enter into any contract or lease for a period exceeding six months, except for the delivery of equipment; permit any employment contracts or substantial changes in the compensation of executives or key personnel or payment of bonuses to anyone; permit defaults on any mortgage or other evidence of indebtedness; permit expenditures exceeding $5,000 for capital improvements; fail to operate their property in substantially the same manner as now; and enter into any transaction out of the ordinary course of business. In the event of substantial violation of any of the foregoing covenants, or the institution of a suit in bankruptcy or receivership against Virginia Stage or WEC, or an assignment for the benefit of their creditors, Transcon may terminate this agreement.

Transcon has received a certified balance sheet of Virginia Stage and subsidiaries as of December 31, 1962, and an income statement for 1962 and the same data for WEC. They warrant that there have been no substantially adverse changes since then. Participating stockholders

will effect the resignations of their companies' elected officers and directors as of the consummation date. Before then, they are to receive from the Internal Revenue Service a ruling to the effect that the proposed exchange of stock shall not give rise to recognition of any gain or loss for Federal income-tax purposes. Transcon, before consummation, is not to declare or pay any dividend in the form of its common stock, perform any act, or enter into any arrangement which will substantially dilute the value of such stock.

Under an agreement of April 22, 1964, executed by Transcon, Safeway, and the latter's controlling stockholders, there would be an exchange of .36 of a share of Transcon's capital stock for each share of Safeway's Class A and B capital stock. In most other respects, this agreement and the previous one are basically the same. Nearly all of the involved stock has been deposited in escrow.

To finance the above transactions, Transcon would issue 824,158 shares of its authorized common stock for the participating stockholders' shares apportioned as follows:

(10)

Company	*Outstanding Shares*	*Transcon Shares*
Virginia Stage	393,650	334,603
WEC (preferred)	1,219	3,048
WEC (common)	791	188,139
Safeway (Class A and B)	1,050,000	298,368
Total		824,158

As seen, WEC owns 169,820 shares of Virginia Stage's stock, for which if would receive 144,347 shares of Transcon

stock. Virginia Stage owns 249,900 shares of Safeway's stock, for which it would receive 89,964 Transcon shares. These new 234,311 shares which they would acquire would be returned to Transcon's treasury for cancellation. Thus the latter would need to issue only 589,847 shares. Because of the trade ratios, many of the participating stockholders would be entitled to fractional shares of Transcon's stock. It is anticipated that not more than 500 shares will suffice for this purpose. Authority will be granted to issue not exceeding 590,347 shares.

No. MC-F-8774 AND FINANCE DOCKET No. 23159

QUEEN'S CORPORATE HISTORY, AFFILIATION, OPERATIONS, AND FINANCIAL DATA

GRIC

Queen's corporate history, organization, affiliation, and operations are described in *Queen City Coach Co. and Smoky Mountain Stages—Control,* 50 M.C.C. 325, *Queen City Coach Co.—Control—Smoky Mountain Stages,* 70 M.C.C. 77, and *Eastern Trailways, Inc.—Control—Carolina Scenic Stages, supra.* It has outstanding 22,264 shares of common capital stock without par value. The principal stockholders are Joel W. Wright, Sr., 2,200 shares, James F. Martin 1,364 shares, Guy D. Carpenter 1,350 shares, Elsie E. Love 1,260 shares, Lillian H. Bradley 1,192 shares, C. H. Bost 1,119 shares, E. E. Bost 1,040 shares, and L. A. Love, 1,004 shares. GRIC has some shareholders in common with Queen. A majority of its 7,992 shares of outstanding common capital stock is owned as follows:

Appendix C

Joel W. Wright, Sr., 1,042 shares, James F. Martin 602 shares, Guy D. Carpenter 494 shares, Elsie E. Love 475 shares, L. A. Love 406 shares, C. H. Bost 374 shares, E. E. Bost, 372 shares, W. E. Smith 274 shares, James A. Hardison Estate 259 shares, and H. H. Hardison Estate 243 shares. GRIC, a non-carrier, is an insurance company and owner of real estate used by Queen and its subsidiaries.

Queen is the sole stockholder of Bragg. It owns ⅔ and GRIC ⅓ of the Ga-Fla capital stock. Queen and Transcon jointly control Smoky. Queen and Virginia Stage jointly control Scenic and it, in turn, controls Coastal and Gray. Queen, CCC, and GRIC own, respectively, 50, 25, and 25 percent of the capital stock of Charlotte Union Bus Station, Inc. (CU), (11) a joint passenger station in Charlotte. Asheville Union Bus Station, Inc. (AU), is a joint passenger terminal in Asheville, 45, 45, and 10 percent of whose capital stock is held by Queen, Smoky, and Scenic, respectively. Trailways Bus Depot of Atlanta, Inc. (TA), a joint passenger facility in Atlanta, is owned ⅓ each by Smoky, Tamiami, and Continental Crescent Lines, Inc., the last wholly owned by Transcon. Queen and Tenn T each owns 50 percent of Bristol Trailways Bus Station, Inc. (BT), a joint passenger facility in Bristol.

Queen operates over routes radiating clockwise from Charlotte to Kingsport and Bristol, Tenn., Hickory, Winston-Salem, Greensboro, Durham, Goldsboro, and Wilmington, N. C., Myrtle Beach and Charleston, S. C., Sylvania and Augusta, Ga., Greenwood and Anderson, S. C., and Asheville. It uses 196 busses and has 541 employees. Smoky serves an area bounded generally by

Asheville, Greenville, S. C., Augusta, Athens, and Atlanta, Ga., and Chattanooga, Sweetwater, Knoxville, and Newport, Tenn., with 41 busses and 85 employees. Ga-Fla operates between Augusta and Lake City. Fla., via Waynesboro, Midville, Dublin, and Douglas, Ga., and between Waynesboro and Wadley, Ga., via Louisville, with 10 employees. It neither owns nor leases equipment. Instead, the carrier with vehicles serving its routes charges Queen for their use and the latter, in turn, is reimbursed by Ga-Fla. Bragg's authority is between Fayetteville and Fort Bragg, N. C. It has neither employees nor equipment, the manner of service being similar to that of Ga-Fla. Scenic's operations extended from Asheville, Marion, and Charlotte, N. C., to Orangeburg and Anderson, S. C., and Augusta. Those of Coastal are mainly between Charleston, on the one hand, and, on the other, Myrtle Beach, Camden, and Orangeburg, S. C. Gray provides sightseeing service in the Charleston area.

Queen's balance sheet as of June 30, 1964, shows assets aggregating $6,619,168, consisting of: Current assets $1,051,994, principally cash $158,647, notes receivable $292,948, and accounts receivable, less reserve for uncollectible accounts, $435,983; carrier-operating property, less depreciation, $3,718,635; intangible property $661,280; investment securities and advances—associated companies $287,651 and other $582,308; and deferred debits $317,300. Its liabilities were: Current liabilities $952,761, chiefly accounts payable $266,245, wages payable $274,059, and unredeemed tickets $264,766; long-term debt due within one year $389,587; equipment and other long-term obligations

$1,070,297; common capital stock $1,334,080; and earned surplus $2,872,443. Its income statements for 1962, 1963, and the first 6 months of 1964 show net income of $1,065,673, $618,625, and $210,013 before, and $870,672, $792,292, and $116,880 after, provision for income taxes, respectively.

Smoky's balance sheet as of June 30, 1964, shows assets aggregating $1,481,571, including current assets $145,358. Its current liabilities were $351,607 and earned surplus (12) $452,952. Its income statements for 1962, 1963, and the first 6 months of 1964 show net income of $185,302, $209,699, and $74,548 before, and $92,233, $129,158, and $48,578 after, provision for income taxes, respectively. The balance sheet of Ga-Fla as of June 30, 1964, shows total assets of $134,430, including current assets $84,701. Its current liabilities were $27,099; common capital stock $137,367 plus premiums and assessments thereon $80,296; and earned surplus (debit balance) $110,332. Its income statement for 1962, 1963, and the first 6 months of 1964 show net income of $17,947 and $592 and a deficit of $5,448 before, and $11,665, $127, and $5,448 after, provision for income taxes, respectively. Bragg's balance sheet as of June 30, 1964, shows total assets of $8,907. Its income statements for the preceding periods show expenses equal to income.

Scenic's balance sheet as of June 30, 1964, shows assets aggregating $1,207,773, including current assets $242,147. Its current liabilities were $559,140 and surplus—unearned $236,992 and earned (debit balance) $417,342. Its income statements for 1962, 1963, and the first 6 months of 1964, show net income of $120,052, a deficit of $231,317, and net income of $49,016, respectively, before provision for income taxes. Coastal's balance sheet as of the above date shows

assets aggregating $163,309. Its surplus was unearned $99,800 and earned (debit balance) $279,538. Coastal's income statements for the preceding periods show net income of $1,877 and deficits of $30,557 and $14,195 respectively, before provision for income taxes. Gray's balance sheet as of that date shows total assets of $80,437 and earned surplus $22,069. Its income statements for the same periods show a deficit of $8,247 and net income of $2,624 and $8,904, respectively, before provision for income taxes. GRIC's balance sheet as of the same date shows assets aggregating $983,208, including current assets $125,263. Its current liabilities were $461,316 and earned surplus $157,850. GRIC's income statements for 1962, 1963 and the first 6 months of 1964 show net income of $12,876, $32,901, and $11,144 before, and $8,209, $22,317, and $7,244 after, provision for income taxes, respectively.

CU's balance sheet as of May 31, 1964, shows total assets of $25,485 and earned surplus (debit balance) $4,456. Its income statements for the years ending July 31, 1962, and 1963, and the period May 31, 1964, show net income, before provision for income taxes, of $518 and $4,068 and a deficit of $4,305, respectively. AU's balance sheet as of October 31, 1964, shows assets aggregating $96,518 and earned surplus $32,729. Its income statements for the years ending October 31, 1962, 1963, and 1964 show net income of $3,739 and $5,772 and a deficit of $3,184, respectively, before provision for income taxes. TB's balance sheet as of June 30, 1964, shows total assets of $863,635 and common capital stock and surplus $261,000. No net income or deficit is recorded on its income statements for 1962, 1963, and the

first 6 months of 1964. BT's balance sheet (13) as of the same date shows assets aggregating $171,385 and earned surplus $11,988. Its income statements for the years ending June 30, 1963 and 1964 show net income, before provision for income taxes, of $1,728 and $390.

AGREEMENTS

Under an agreement executed on May 16, 1964, by Transcon and Queen and the latter's stockholders, Transcon would exchange 7.25 shares of its capital stock for each share of Queen's. The remaining terms are essentially the same as those in the Transcon-Virginia Stage agreement. By another agreement of the same date, to which GRIC's stockholders are parties, Transcon would exchange 7.25 shares of its capital stock for each share of GRIC's. The terms of this and the preceding agreement are otherwise virtually the same. All of the involved stock has been deposited in escrow. Internal Revenue Service has ruled that no gain or loss will be recognized as a result of the exchange of the stock of Virginia Stage, WEC, Safeway, Queen, and GRIC for that of Transcon.

Queen's board of directors, at a meeting held on May 21, 1964, approved employment contracts with L. A. Love, president, and W. E. Smith, chairman of the board. The one with Love, who is 70, provides for a period of 10 years at an annual salary of $20,000 and full-time attention to Queen's business, but half-time after his retirement. If Love is forced into retirement by impaired health, he would receive $6,000 annually. Smith was to continue as chairman of the board and also serve in an advisory capacity at $6,000 per annum. Unfortunately, he has suffered a stroke and is unable to work. There is no basis for a con-

clusion that these contracts are intended as indirect devices for increasing the consideration for the sellers' capital stock. Compare *Dealers Transit, Inc.—Control and Merger,* 87 M.C.C. 571.

To finance these transactions, Transcon would issue 161,414 shares of its stock for the 22,264 shares of Queen's and 57,942 shares for the 7,992 shares of GRIC's or a total of 219,356 new shares. Queen owns 160 shares of GRIC's stock, for which it would receive 1,160 Transcon shares, and 1,000 shares of the latter's stock. These 2,160 shares would be returned to Transcon's treasury for cancellation. Hence, it would need to issue only 217,196 shares. Because of the trade ratios, many of the participating stockholders would be entitled to fractional shares of Transcon's stock. It is expected that no more than 100 shares will suffice for this purpose. Authority will be granted to issue not exceeding 217,296 shares.

(14) Nos. MC-F-8744 and MC-F-8774

Public Interest

As previously noted, Transcon, with its subsidiaries, operates over 45,575 miles of routes in 36 states. Should the instant transactions be approved, it would increase its territorial coverage by 10,860 miles or 23.8 percent in some of these states and in the seven additional states of New England and Delaware. There are several minor duplications in routes and virtually none in service. The carriers to be controlled, directly and indirectly, called the subject carriers, provide through service under pooling arrange-

ments. They assign busses to the pool in proportion to their certificated route miles. If a carrier lacks vehicles, it leases them "by the mile" from the others. Virginia Stage participates with the subject carriers in 35 through-service routes, 10 of which include Transcon, for example, between Boston and Miami, Fla., between New York City and (1) Miami, (2) Atlanta, (3) Memphis, (4) Houston, and (5) Dallas, Tex. Similarly, Safeway participates in 39 through-service routes, 10 of which include Transcon, for instance, between Portland and Washington and between Philadelphia and (1) Birmingham, Ala., and (2) Knoxville. Many of the routes duplicate those of Virginia Stage. TNE is involved in through routes between Portland and Washington, with Safeway as the connecting carrier, and between Boston and Miami, connecting with other TBS carriers. Queen, Smoky, and Ga-Fla participate in the operation of through routes with the subject carriers, including 15 with Transcon, some being duplications of the Virginia Stage and Safeway routes, for example, between New York and (1) Houston and (2) Miami, between Philadelphia and Memphis, between Charleston and Cleveland, between Jacksonville and Chicago, and between Norfolk, Va., and Denver, Colo. From August 1963 through July 1964, Queen derived $2,583,101 from its pooled operations. Transcon participates in 17 through-service routes with the subject carriers, some of which are included in those described above. The number of such routes is being increased.

In the first 6 months of 1964, Virginia Stage billed TBS carriers $1,003,335 for interline service and they recipro-

cated with $376,582. The corresponding amounts with Greyhound are only $45,068 and $44,835. For the months of April, May, and June 1964, Safeway billed TBS carriers $641,734 and they charged it with $855,755 for interstate and intrastate service. The respective sums with Greyhound are merely $4,610 and $9,696. In the last period, TNE billed TBS carriers $88,220 and they reciprocated with $239,469. The corresponding figures with Greyhound are $7,826 and $15,443. Within this period, Queen was billed $374,928 by TBS carriers and $50,895 by Greyhound. It is the policy of the subject carriers to try to retain originated passengers on their lines or on those of other TBS members, unless the passengers' convenience dictates (15) different routes. There are two apparent reasons for this practice, the passenger's comfort by minimization or elimination of interchange and the carrier's profit. It is common knowledge that the cost per bus mile operated decreases with the increase in distance, so that the more revenue a carrier takes in, the greater the net income. Virginia Stage's one-way fare from Washington to Los Angeles, 2,649 miles, is $76.75. If the passenger traveled on its line from Washington to Roanoke, 229 miles, it would receive $6 and the connecting carriers to destination $70.75. Safeway's one-way fare from New York City to Miami, 1,336 miles, is $38.15. If the passenger rode on its line from New York City to Washington, 225 miles, the corresponding division of revenue would be $7.35 and $30.80. TNE's one-way fare from Boston to Houston, 1,856 miles, is $53.25. If the passenger traveled on its line from Boston to New York

City, 216 miles, the similar division would be $6.56 (or less, depending on the gateway used) and $46.69.

Transcon and the subject carriers have cooperated closely for many years, as demonstrated by their pooling programs. They have a vital stake in the continuance and improvement in this service. To illustrate, Safeway derives approximately 85 percent of its revenue from the New York City-Washington operations. Queen's pool operations "produce a higher revenue per bus mile than the other operations." Revenue therefrom for the year ending July 1964 reached $2,583,101. It is estimated that 60 percent of TNE's revenue is earned from its Portland-New York City operations. The present posture of these carriers is nevertheless vulnerable. Certainly each one cooperates when it stands to benefit. When, however, the situation is unfavorable, the action is each to its own. In the summer of 1964, these carriers added a schedule from New Orleans to New York City. Transcon's run from New Orleans to Atlanta was unprofitable. But the connecting subject carriers were earning from minor to major profit. It nevertheless discontinued the run because of lack of financial interest beyond Atlanta. The passenger traffic patterns have changed in recent years from short to long haul. In some areas, the former "has more or less dried up," and it is the latter that "keeps us all going today." With minor exceptions, Transcon does not operate along the Atlantic seaboard. Yet, the traffic generated in this large and populous area is vital to it in order to feed the long-line operations to the west. Centralized control of the subject carriers' operations would enable Transcon to establish sufficient coordinated through schedules, as be-

tween Portland and Lake City, and between Charleston and Los Angeles, to the advantage of the entire system and in the public interest, utilize more efficiently equipment of the latest type and other facilities, and effect economies. Broader territorial coverage and conveniently coordinated through schedules tend to generate additional traffic and to offset in part seasonal fluctuations. Control of the subject carriers would fortify Transcon in facing Greyhound's intensive competition.

(16) PROTESTANTS

GREYHOUND

Greyhound's capitalization, ownership of three carrier and certain non-carrier companies, and operations are described in *California Parlor Car Tours Co.—Pur.—Greyhound,* 93 M.C.C. 392, and *Greyhound Corp. Stock,* 97 M.C.C. 34. It operates through four divisions, Central, Eastern, Southern, and Western, over 92,084 miles of routes serving points in all of the contiguous States, with 5,171 busses and an average of 24,264 employees. Greyhound's consolidated balance sheet as of December 31, 1964, shows assets aggregating $333,681,647, including current assets $89,641,839. Its current liabilities were $60,541,154 and earned surplus $64,801,505. Greyhound's consolidated income statements for 1963 and 1964 show net income of $64,480,949 and $69,101,576 before, and $32,201,317 and $37,679,157 after, provision for income taxes. Greyhound's total revenue per bus mile rose steadily from 44.5 cents in 1954 to 65.3 cents in 1963 and expenses from 28.7 cents to 53.7 cents doubling the favorable difference.

Appendix C

Relating passenger revenue, by exclusion of express and other revenue, to total expenses, produces almost a marginal situation, but is factually incomplete.

As previously noted, some of the subject carriers interchange passengers with Greyhound, but the revenue involved is naturally small when compared with that among the TBS members. The passengers transferred to it are in three categories, (1) those destined to exclusive Greyhound points, (2) those traveling to points at which it has the only direct service, and (3) those for whom it is basically convenient to journey in this manner. In May and June of 1964, Greyhound billed Virginia Stage under (1) $5,294 (49.4% of total) for moving 1,519 interstate passengers; under (2), $1,413 (13.19%) for 308 passengers; and under (3) $4,009 (37.41%) for 482 passengers. The corresponding figures for Safeway in April, May, and June 1964 are (1) $4,613 (59.97%) for 1,291 passengers, (2) $604 (7.85%) for 111 passengers, and (3) $2,476 (32.18%) for 569 passengers. The respective totals of TNE for the same period are (1) $4,862 (38.66%) for 883 passengers, (2) $1,721 (13.68%) for 218 passengers, and (3) $5,994 (47.66%) for 1,193 passengers. The conforming figures of Queen for that period are (1) $35,635 (70.3%), (2) $8,313 (18.1%), and (3) $2,268 (11.6%) (optional honoring).

In 1961, 1962, and 1963, Greyhound received from the subject carriers interline revenue of $548,643, $507,655, and $605,786, respectively, total $1,662,084.[3] Greyhound recipro-

[3] Safeway's employees were on strike from May 17 through June 13, 1963. Bragg does not issue interline tickets. Ga-Fla is included in Queen's account. Smoky's figures for January through March 15, 1961, are not available.

cated with $366,987, $373,717 and $415,134, total $1,155,838. (17) The excess of the amount it received from, to that it gave them, was, in its favor, 49.5 percent in 1961, 35.8 percent in 1962, and 45.9 percent in 1963, total 43.8 percent. In contrast, Greyhound received from Transcon companies $1,105,188, $1,296,138, and $1,333,061, total $3,734,387, and transmitted to them $1,450,534, $1,623,431, and $1,545,885 total $4,619,850. The corresponding margins were 76.2 percent, 79.8 percent, 86.2 percent, total 80.8 percent to its disadvantage. If Transcon, its subsidiaries, and the subject carriers had been part of one system during the first 6 months of 1964, their intercity scheduled vehicle miles would have mounted from 53,947,093 to 77,461,919, an increase of 23,514,826 or 43.6 percent; the corresponding figures for scheduled intercity passenger revenue would have been $20,806,751, $32,860,953, $12,054,202 or 57.9 percent; operating revenues $28,885,365, $44,061,803, $15,176,438 or 52.5 percent; net income before income taxes $751,372, $1,903,706, $1,152,334 or 153.4 percent; and net income after such taxes $303,379, $899,589, $596,210 or 196.5.

Greyhound feels that, if the applications should be approved, "there is a very good possibility * * * that at least the large portion of that traffic (from subject carriers) will be diverted from" it. Compounding this fear is the terminal situation in North Carolina. When any city there is served by two or more passenger carriers, all of them are required by statute to operate out of a joint bus terminal manned by its own personnel. Every terminal is controlled by a board of directors on which each carrier is represented by a member with one vote. The law pro-

vides for fair and impartial operation, and any carrier dissatisfied therewith may file a complaint with the North Carolina Public Utilities Commission, which Greyhound has done as to terminals in Charlotte, Asheville, Raleigh, Fayetteville, and Gastonia. There are eight major terminals in North Carolina, of which Greyhound operates one and the others are controlled by TBS carriers, so that the former does not "have much chance." Conditions are "bad enough today" with relatively short-haul carriers "interested primarily in grabbing * * * whatever traffic they can" for their lines and not quite "as vigorous in taking the traffic that might go beyond their lines * * * but we think it would be a lot worse if Continental (Transcon) were the carrier controlling the stations." Greyhound's revenue per passenger mile averages 2½ cents and the operating cost per mile averages 55 cents. Hence, it must have 22 passengers on a bus to cover the operating cost. When the disparity between cost and revenue "gets close, of course, the loss of one or two passengers can mean the difference between operating in the red or operating in the black."

INVESTORS

Investors is a promoter of business enterprises. It has been trying to penetrate the intercity bus industry since 1963, when it offered to purchase from their stockholders first Queen's shares and later those of Tamiami. By May 4, 1964, Investors (18) concluded that its plans in this respect had advanced to "satisfactory stages of agreement," and so informed Transcon. The latter, however, since 1949, had been discussing with Queen, Virginia Stage, and Safe-

way the desirability of consolidating their operations and those of other carriers so that they "could effect a more competitive situation * * * and render at the same time a more coordinated service to the public." Investor's letter of May 4 was postmarked May 16, New York City, and received by Transcon on May 18. The latter, unaware of the former's existence, much less that it was negotiating for Queen's capital stock, transmitted the last of a series of proposed contracts to five of that carrier's principal shareholders. This instrument, executed May 16, 1964, culminated in the filing of the application in No. MC-F-8774. Before Investors wrote this letter, Transcon issued news releases announcing the agreements involving Virginia Stage and Safeway. That respecting Queen was contained in the release of June 8, 1964. The letter, referring to the Virginia Stage and Safeway acquisitions, states: "On the other hand, it would seem that the antitrust laws most probably will inhibit further acquisitions by your company * * * than those already announced, even though such a further program might be susceptible of ICC approval. Hence we do not believe that the acquisitions we have underway (Queen and Tamiami) should be considered as properly competitive with your own acquisition plans."

When Investors learned of Transcon's agreement with Queen and its stockholders, it instituted lawsuits against them in the District Court of the United States for the Western District of North Carolina.[4] The litigants eventually settled the dispute, or so it seemed, and Investors

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[4] Civil Action No. 1914, Interstate Investors, Inc. v. L. A. Love, et al., and Civil Action No. 1935, Interstate Investors, Inc. v. Queen City Coach Company and General Realty and Insurance Corporation.

filed a petition to withdraw as protestant in the Commission proceedings.[5] However, shortly thereafter, Investors notified the Commission that plaintiff and defendants had not exchanged "satisfactory releases" and requested that such petition "be held in abeyance until authorization" for processing "is authorized by subsequent letter." In such a letter, by way of clarification, Investors notes that an order of voluntary nonsuit was entered in the above Court. "The collateral matters of releases * * * and documents relating to requiring our withdrawal from subject ICC proceedings were never presented to the District Court in Charlotte. We, of course, shall present them to the District Court in the Southern District of New York in connection with our antitrust complaint against Transcontinental to be filed in the latter court."

(19) CONTENTIONS

Transcon and the principal subject carriers contend that the transactions are consistent with the public interest, and should therefore be approved, on the following grounds: (1) The consideration for the sellers' capital stock is reasonable; (2) the operations of Transcon and the subject carriers are complementary; (3) numerous savings would be effectuated following consummation; (4) improved through service would benefit the public and strengthen Transcon's position as Greyhound's competitor; (5) the latter's claim that the centralized operations would divert much traffic from it is completely unfounded, since it is by

[5] Received February 23, 1965.

far the dominant carrier in the industry; (6) the terminal situation in North Carolina has a statutory basis and that State's Public Utilities Commission can be depended on to enforce the law and protect any aggrieved party; (7) Investors, a non-carrier, is a frustrated bidder for Queen's capital stock whose case is based on accusations and innuendo; (8) the depositary receipts are not securities unlawfully sold to the public; and (9) approval herein would create a duopoly, thereby increasing competition. The principal cases cited in support of the foregoing contentions are *Transamerican Freight Lines, Inc.—Purchase—Gorman,* 5 M.C.C. 712, *Greyhound Corp.—Control—Florida Motor Lines Corp.,* 45 M.C.C. 83, *Trailways of New England, Inc.—Purchase—Interstate,* 93 M.C.C. 217, *McLean Trucking Co.* v. *United States,* 321 U. S. 67, *West Coast Bus Lines Common Carrier Application,* 41 M.C.C. 269, *Greyhound Corp.—Control—Southeastern Greyhound Lines,* 57 M.C.C. 123, *Transcontinental Bus System, Inc.—Control—Continental,* 50 M.C.C. 193, and *Pacific Greyhound Lines—Purchase—Oregon Motor,* 59 M.C.C. 657.

Greyhound argues that the transactions are contrary to the national transportation policy because (1) the volume of available traffic does not warrant the establishment of another single-line operation between Maine and Florida; (2) such service would enable Transcon to divert long-haul traffic, in view of the North Carolina Terminal problem; (3) there is no need for that service; and (4) the facts of record justify a finding that change in control of the subject carriers has already been accomplished without the Commission's approval. To support its position, Greyhound cites *Associated Transport, Inc.—Purchase—Russell,*

Appendix C

55 M.C.C. 177, *Pacific Intermountain Exp. Co.—Control and Purchase*, 57 M.C.C. 341, *Denver-Chicago Trucking Co., Inc. —Pur.—Boulder Truck*, 70 M.C.C. 309, *Super Service Motor Freight Co., Inc.—Pur.—Hayes Frt.*, 60 M.C.C. 389, and *Greyhound Corp.—Control—North Coast Transp. Co.*, 55 M.C.C. 801 (not printed in full).

Greyhound requests the following findings:

(1) A consolidation of rights which would result in a single-line service from Maine to Florida is unquestionably a new service.

(20) (2) The fact that applicants have failed to introduce any traffic figures reflecting interchange amongst them raises the presumption that the proposed consolidations would result in a new and different service.

(3) Applicants failed to introduce any evidence which would establish that a need exists for the tremendous new single-line operations here proposed.

(4) The proposed transactions threaten extensive passenger traffic losses to Greyhound.

(5) The national transportation policy requires preservation of a sound passenger system by bus.

(6) The facts of record in these transactions warrant a finding that control of vendors may already have passed to Continental without approval of the Commission.

Investors maintains that the applications should be denied as not in the public interest for the reasons that: (1) The interstate scheduled bus industry "has great need of the development of at least a third major, national competitor," and the Commission "has the obligation to

nurture competition" therein; (2) "it would appear to be the grossest breach of public trust for the Commission to take action * * * that would reduce competition and resultant adequacy of service to the public;" (3) authority to grant immunity from the antitrust law "is not the equivalent of release from the need to consider the economics of monopoly and duopoly;" (4) there is not a "single bit of evidence from independent or public interest sources or economists skilled in transportation matters introduced at the hearings by the applicants," and the Commission "has been derelict in its obligation to protect the public interest by failing to have economic material as to the competitive structure in the industry inserted into the record;" (5) the sale of depositary receipts for the stock of Queen and GRIC by several holders was made in a suddenly contrived market without filing a registration statement with the Securities and Exchange Commission; and (6) the Examiner's "rulings limiting and excluding evidence relating to the economics of monopoly and duopoly and economic alternatives" are "clearly erroneous." Investors relies on *McLean Trucking Co.* v. *United States,* 321 U. S. 67, *Kobe* v. *Dempsey Pump,* 97 F. Supp. 342, and *U. S.* v. *General Electric Co.,* 82 F. Supp. 753, to sustain its postulates.

Discussion and Conclusions

Before delving into the merits of the issues, it is advisable to dispose of some preliminary matters. On September 1, 1964 in No. MC-F-8648, *Eastern Trailways, Inc.—Control—Carolina Scenic Stages,* —— MCC. ——, Queen

and Virginia Stage were authorized to acquire joint control of Scenic, and, in turn, of Coastal and Gray, through purchase of (21) its capital stock. At the opening of the initial hearing, Transcon moved that the last three carriers be added to others herein of which it would acquire indirect control. The Examiner granted the motion, subject to publication of notice in the Federal Register. There is no protest to the amendment. Since Transcon filed identical amendments in both section-5 proceedings, the titled application, to the extent of the amendment, will be dismissed. Tenn T having been included as a subject carrier in both proceedings, the application in No. MC-F-8774 will be dismissed as to it. Virginia Stage, Tamiami, and CCC jointly control (⅓ each) SCL. Should the transactions in No. MC-F-8744 be consummated, Transcon would own merely ⅓ of the latter's stock. SCL was included as a subject carrier "out of an abundance of caution," but "no control will actually be obtained" by Transcon. Tamiami and CCC are not subject carriers. There is merit in this position, and the application will be dismissed in this respect. Compare Finance Docket No. 21755, *Missouri Pac. R. Co.—Control—Chicago & Eastern Ill. R. Co.*, —— I.C.C. ——, decided February 16, 1965. WEC, a noncarrier, owns 43 percent of Virginia Stage's stock. Following consummation in No. MC-F-8744, the former would own approximately 5 percent of Transcon's capital stock, making it the fifth largest stockholder. However, WEC would turn these shares into Transcon's treasury for cancellation, and consequently would cease to be a stockholder of Virginia Stage. WEC was likewise made a party out of an abundance of caution. The application will accordingly

be dismissed as to it. The Stock of Ga-Fla is owned ⅔ by Queen and ⅓ by GRIC, and Queen has exclusive control of that carrier. GRIC is a non-carrier, and also was included as a party in No. MC-F-8774 out of an abundance of caution. Hence the application will be dismissed in this respect. On the penultimate day of the continued hearing, Investors moved that the Commission appoint and assign an economist to assist and advise the Examiner in developing for the record "material relating to monopoly aspects of this acquisition of control." The Examiner denied the motion, but it was placed before Commissioner Tuggle, Chairman of Division 3, who, the next day, "orally denied the request * * * orally to argue * * * the merits" of the motion.

The exchange of Transcon's stock for that of Virginia Stage, WEC, Safeway, Queens City, and GRIC is based on "earnings ratio," including that of subsidiaries. In the case of the last two companies, their net income of 1963, after income taxes, was used and that of 1962 for the three others. While the negotiations contemplated an "earnings ratio," the final figures vary somewhat therefrom because differences mainly in methods of depreciation and investment credit necessitated relatively minor adjustments. Thus, the Transcon-Virginia Stage earnings ratio of .83:1 was increased to a trade ratio of .851, WEC (common) from 237.56.1 to 237.85:1, Safeway from .34:1 to .36:1, and Queen-GRIC from 7.18:1 to 7.25:1. Transcon's net book value per share advanced from $11.04 in 1962 to $12.59 in 1963. After elimination of inter-company ownership, Virginia Stage's net book value per share as of December 31, 1962, was (22) $14.51; the exchange rate multi-

plied by Transcon's 1962 net book value was $9.38; thus, the excess of the net book value per share received by the latter over that of the surrendered shares is $5.13. The amounts relating to Safeway are $5, $3.97, and $1.03; Queen $198.98, $91.28, and $107.70; GRIC $36.67, $91.28, and $54.61 debit balance);[6] and WEC common $4,427.36, $2,625.86, and $1,801.50, and preferred $93.66, $27.60, and $66.06. To portray a clear and convincing picture of the advantages of the proposed transactions, Transcon assumes merger into itself of the five last named companies as of December 31, 1963, with the following results: Its net worth, excluding intangibles, would have increased by 41 percent, operating revenues and net income after income taxes 37 percent, total assets 40 percent, long-term debt 34 percent, miles operated 35 percent, earnings per share 11 percent, and net book value per share, excluding intangibles, 15 percent. Since only control is involved here, the results would obviously be less impressive. They nevertheless do support the proposition that the stock exchange is reasonable. Some of the monetary and service benefits would be largely realized in either event, such as savings from mass purchasing of busses and supplies, joint advertising, effective utilization of equipment, low inventory, centralized accounting, reduced insurance premiums, and coordination of schedules in the larger interest of through, rather than local, service. As only an exchange of stock is involved in these transactions, no fixed charges would be incurred. As of June 30, 1964, Transcon's capitalizable assets substantially exceeded its capitalization. It would finance the transactions

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[6] Combined with Queen's excess, there is a surplus of $53.09.

through the issuance of not more than 807,643 shares of stock having an aggregate par value of $807,643, and its investments in subsidiaries would be increased by a like amount. The net book value of the stock to be acquired, except GRIC's, exceeds that issued therefor. It is accordingly obvious that Transcon has sufficient capitalizable assets to support the proposed increase in its capitalization.

Expansion of territorial coverage tends to attract additional passengers, making for a higher load factor per bus. The savings to which reference has been made are many, ranging from $2.50 on 1,000 baggage checks to $1,100 on each engine. Coordinated schedules for the enlarged area would expedite and improve the through service provided by the involved carriers. In the first 6 months of 1964, Virginia Stage and TBS carriers billed each other a total of $1,379,917, while that with Greyhound was $89,902. Safeway's corresponding amounts for April, May, and June 1964 are $1,497,489 and $14,306. During the same period, the respective figures for TNE are $327,689 and $23,269. Within this period, Queen was billed $374,928 by TBS carriers and $50,895 by Greyhound. It is clear from these comparisons that the latters's interline revenue with these carriers is of no material significance when contrasted with that resulting from their interchange with other TBS carriers. (23) In 1961-3 Greyhound received from the subject carriers interline revenue aggregating $1,662,084 and reciprocated with $1,155,838, the margin in its favor being 43.8 percent. Contrariwise, it received from Transcon carriers a total of $3,734,387 and paid them $4,619,850, for a deficit of 19.2 percent. The passengers transferred to Greyhound are classified into three categories: (1) Those destined to ex-

clusive points, (2) those destined to points at which it has the only direct service, and (3) those for whom it is convenient to journey in this manner. Analysis of Virginia Stage tickets honored by Greyhound reveals that the latter billed the former in May and June of 1964 amounts representing 49.4 percent in category (1), 13.19 percent in (2), and 37.41 percent in (3). The corresponding percentages with Safeway for April, May, and June of 1964 are 59.97, 7.85, and 32.18. The respective figures with TNE in the same period are 38.66, 13.68, and 47.66. The conforming percentages with Queen for that quarter are 70.3, 18.1, and 11.6. The revenue in category (1) cannot be diverted from Greyhound; that in (2) would be less vulnerable than is apparent, since passengers subjected to unduly circuitous routing or transfer at connecting points, when through service over direct routes is available by another carrier, are unlikely to patronize the first carrier; the revenue in (3) would be in jeopardy, but it is only 37.41 percent of the total with Virginia Stage, 32.18 percent with Safeway, 47.66 percent with TNE, and 11.6 percent with Queen. It is important to note that the entire revenue with the first three carriers is $30,986 compared with Queen's $46,215.

In 1963, the passenger revenue of all Class I intercity bus carriers reached $408,975,000, with Greyhound accounting for 63 percent of the total, TBS members 23 percent, and others 14 percent. Assuming approval of the transactions, Transcon carriers' proportion of the total would have been 18 percent and Greyhound's 63 percent. Based on total revenue of $527,820,000, the corresponding percentages would have been 18 and 61. Had the subject carriers been merged into Transcon as of December 31, 1963,

the latter, subsidiaries included, would have owned assets aggregating $77,188,125 or 28 percent of Greyhound's $278,909,171, recorded net worth 23 percent of the latter's, and owned 2,052 busses against Greyhound's 5,000. If these merged carriers had operated during 1963, they would have earned net income, after income taxes, of $7,141,746 or 22 percent of Greyhound's $32,201,317 and operated 184,900,000 bus miles versus the latter's 514,000,000. Greyhound "last year extracted profits at a rate few companies in the transportation business can even approach, much less match. At $28 million, or $2.01 per share, total net profit amounted to a whopping 19% return on stockholders' equity. * * * In recent years Greyhound has been generating enough cash * * * to reduce long-term debt a dramatic 65% since 1958. In 1961 they prepaid $11 million in equipment obligations coming due in the next three years, enabling Greyhound to get free of equipment debt to banks for the first time in a quarter of a century." Forbes, May 1, 1963, p. 20. Transcon is the only bus carrier which "even remotely (24) approaches Greyhound in size. * * * But under the steady hand of President Maurice E. Moore, Transcontinental, too, makes a good thing of the bus business. It does so despite the fact Moore operates at a clear disadvantage in one crucial respect: Few of his routes cover the populous Atlantic seaboard and Northeast, areas of heavy traffic and relatively high fares. Thus, Transcontinental's load factor (i.e., percentage of seats occupied) was just 40% last year (vs. Greyhound's 55%), and Transcontinental got far less revenue per bus-mile operated." Ibid. p. 23. Greyhound is the sole real competitor of Transcon and the subject carriers.

Appendix C

Greyhound is emphatic in pointing to "the failure on the part of applicants to introduce any exhibits reflecting the amount of interline traffic which they have handled in any joint operations they may perform." In the face of this failure, "applicants must establish by substantial probative evidence that a need exists for the institution of what in effect would be a new service," as is evident from the cases it previously cited. This allegation is not quite correct, and so lacks merit. There are five exhibits which show pooling of busses and revenue in the rendition of through service in which (1) the subject carriers participated, (2) they and other TBS members, except Transcon carriers, joined, and (3) all such carriers participated.[7] Queen derived $2,583,101 in revenue from pool operations from August 1963 through July 1964. Greyhound's own exhibits demonstrate that its interchange with the subject carrier in 1961-3 amounted to $2,817,922 and with Transcon carrier $8,354,237.[8] Other exhibits compare interline revenue during stated periods between Virginia Stage, Safeway, TNE, and Queen, on the one hand, and, on the other, (1) TBS carriers and (2) Greyhound.[9] Regarding the North Carolina terminal situation, assuming, *arguendo,* that Greyhound is at a disadvantage there, it did not adduce any evidence by which to measure the actual or potential loss of revenue. Greyhound "admits that its overall operations have been somewhat successful in the last several years." but the "profit is not from strict passenger operations." It is true that Greyhound's excess of passenger revenue other

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[7] Nos. 48, 87, 94, 124, and 160.
[8] Nos. 151-3.
[9] Nos. 50, 89, 96, and 128.

expenses is minimal, but when its revenue from express, charter operations, locker rentals, and commissions is included, as it should be, because of the direct relationship to transportation, the excess of total revenue over expenses mounted to 11.1 cents per bus mile in 1962 and 11.6 cents in 1963. Moreover, no consideration is being accorded to the insurance, leasing, and other enterprises of which Greyhound has recently acquired control. The variety of financial and operating data discussed in detail earlier herein is convincing that Greyhound is the dominant (25) for-hire motor-bus carrier of passengers on the national scene. Approval of the transactions would extend Transcon's operations, through the subject carriers, into the northeastern seaboard and would intensify, not create, competition there and in other areas of the country. Compare *Greyhound Corp.—Control—Florida Motor Lines Corp., supra.* There is little likelihood that Greyhound's operations would be jeopardized thereby. Compare *Trailways of New England, Inc.—Purchase—Interstate, supra.*

Investors, at the hearing, pitched its position on two principal points, (1) its prior purchase of Queen's capital stock, and (2) Transcon's duopoly in violation of the antitrust laws. On brief, Investors addresses itself primarily to point (2). Hence, it is sufficient to conclude that Investors' alleged purchase of Queen's capital stock and the claimed advantages to itself and the public which would result therefrom may not properly be considered in the absence of an appropriate application. *Pacific Greyhound Lines—Purchase—Oregon Motor,* 59 M.C.C. 657, and *Atlantic Greyhound Corp.—Purchase—Gilmer,* 45 M.C.C. 670. The present "is no time to set up a duopoly pat-

tern" in the scheduled intercity bus industry, which "would reduce competition and resultant adequacy of service to the public." There is great need for the "development of at least a third major, national competitor," and the Commission "has the obligation to nurture" such competition. Authority to grant immunity from the antitrust "laws is not the equivalent of release from the need to consider the economics of monopoly and duopoly. Also the Commission has been derelict in its obligation to protect the public interest by failing to have economic material as to the competitive structure in the industry inserted into the record." Taking the last allegation first, it is sufficient to note that there is no law requiring the Commission to develop such material for the record. Compare *Broth. of Maint. of Way Employees* v. *United States,* 221 F. Supp. 19. The Commission, however, favors the establishment of an Economic Counsel and supporting staff.[10] The President's budgets for fiscal years 1963-4 provided for it, but Congress failed to appropriate any funds therefor. In the landmark case of *McLean Trucking Co.* v. *United States, supra,* the Supreme Court declared:

> • • • there can be little doubt that the Commission is not to measure proposals for all-rail or all-motor consolidations by the standards of the anti-trust laws. Congress authorized such consolidations because it recognized that in some circumstances they were ap-

[10] Hearings before the Subcommittee of the Committee on Appropriations, United States Senate, 88th Cong., 1st Ses., Part I, pp. 454 and 477-8, and Part 11, pp. 1264, 1266-7, 1282-6, and 1294-6, and Hearings before a Subcommittee on Appropriations, House of Representatives, 88th Cong., 1st Ses., Part I, pp. 385 and 413-6.

propriate for effectuation of the national transportation policy. It was informed that this policy would be (26) furthered by 'encouraging the organization of stronger units' in the motor carrier industry. And in authorizing those consolidations it did not import the general policies of the anti-trust laws as a measure of their permissibility. It in terms relieved participants in appropriate mergers from the requirements of those laws. Section 5(11) * * * Against this background, no other inference is possible but that, as a factor in determining the propriety of motor carrier consolidations the preservation of competition among carriers, although still a value, is significant chiefly as it aids in the attainment of the objectives of the national transportation policy.

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Congress however neither has made the anti-trust laws wholly inapplicable to the transportation industry nor has authorized the Commission in passing on a proposed merger to ignore their policy. Congress recognized that the process of consolidating motor carriers would result in some diminution of competition and might result in the creation of monopolies. * * * Hence, the fact that the carriers participating in a properly authorized consolidation may obtain immunity from prosecution under the anti-trust laws in no sense relieves the Commission of its duty, as an administrative matter, to consider the effect of the merger on competitors, and on the general competitive situation in the industry in the light of the objectives of national transportation policy.

> In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy.[11]

From the cases and articles just cited and *Florida East Coast Railway Company* v. *United States,* 242 F. Supp. 14, it is apparent that the Commission is "required to accommodate section 5(2) and the antitrust legislation[12] due to the presence of the section 5(11) exemption and the history of the development of the national transportation policy." 242 F. Supp. 18. But it need accord weight to "antitrust policy in a section 5(2) (27) proceeding only if the merger has the probable anti-competitive effect proscribed by section 7 of the Clayton Act. More specifically, when the effect of a proposed merger 'may be substantially to lessen competition' or 'to tend to create a monopoly,' in 'any line of commerce in any section of the country,' the prohibition of the Clayton Act must be given weight. Conversely, when the proposed merger would not so result, the Commission is not required to give weight to anti-trust policy." Ibid. p. 20. Assuming, *arguendo,* that approval of the transactions will result in a monopoly and lessening of

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[11] See also *Minneapolis & St. Louis R. Co.* v. *U. S.,* 361 U.S. 173, Carl H. Fulda, "Antitrust Considerations in Motor Carrier Mergers," 56 Mich. Law Rev. 1237, and G. E. and Rosemary D. Hale, "Competition or Control III: Motor Carriers," 108 U. Pa. Law Rev. 775.

[12] Sherman and Clayton Antitrust Acts.

competition, the advantages to the public of through service in an enlarged territory, reduction of the imbalance in the flow of traffic, more effective utilization of equipment and facilities, improvements in safety programs, and substantial savings in operating costs are consistent with the public interest and "will assist in effectuating the over-all transportation policy." Actually, no monopoly would emerge from such approval, as the statistics detailed before and those below demonstrate. The facts here are different from those in the case last cited, where the court noted the Commission's recognition that "the merger would supplant the duopoly with a rail Monopoly." Ibid. 22.[13] Here, on the contrary, broadly speaking, a duopoly would supplant a monopoly in intercity passenger transportation. From the facts already presented, it is not unfair to characterize Greyhound as a Giant and Transcon as a Dwarf. Passenger carriers' operating revenues in 1963 reached $758,904,000 and Class I intercity motor carriers $609,756,000. I.C.C. 78 Ann. R. 34, 127, 153.[14] Their operating ratio was 86.76. Ibid. p. 153. The revenue from all modes of transportation, by percent, accrued as follows: Motor carriers for hire 2.63, private automobile 89.69, airways 5.12, rail and electric railways 2.23, and inland waterways 0.33. Ibid. p. 34. These percentages prove that the private automobile, in the aggregate, is the monopolist in

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[13] "At most, the rail monopoly that would result from the merger in portions of Florida would merely supplant the duopoly which has long existed there." *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line,* 320 I.C.C. 122, 165.

[14] Exhibit 76 shows total operating revenues of $527,829,000, but there is no indication that the discrepancy affects the percentage allocated to each mode.

passenger transportation. However, in competition for the motor-carriers' for-hire portion, Greyhound is, and will remain, even after approval of the transactions, as the data adduced demonstrate, the Giant of intercity bus transportation.

Investors wishes to create a "third force," beginning with Queen and Tamiami, to compete with Greyhound and Transcon. In this endeavor, it sought, during the hearing, the help of the Antitrust Division of the Department of Justice, the Securities and Exchange Commission, and even the Interstate Commerce Commission. The record shows that the Examiner gave it every (28) opportunity in this respect, but it was unsuccessful. Investors persistently maneuvered to introduce evidence regarding its attempt to purchase Queen's capital stock, after it was permitted to outline briefly the facts of the situation and the Examiner made it clear that the Commission would not resolve its dispute with Queen and Transcon, a matter for settlement among themselves or in court. In both instances, the Examiner found it necessary, several times, to admonish Investors' witness, its president and counsel of record, to desist from offering irrelevant and cumulative evidence of the type which the Examiner stated he would not admit in evidence. In connection with the "third force" as an alternative to the proposed duopoly, he asked such questions and made such comments as:

> I want to ask this witness (of Transcon) whether this group as a third force in the industry would constitute a viable efficient economic unit. • • •

• • • • • • • • •

Appendix C

I am asking a theoretical question.

* * * * * * * * *

I am saying there would be equal economies in other relationship.

* * * * * * * * *

I have got to keep it theoretical.

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Can you describe to us what the criteria would be for developing a third marketable security in the intercity bus business.

I am trying to prove that there is economic damage to Tamiami and Carolina Coach that will develop.

It should be noted that Tamiami and CCC, whom Investors was trying so zealously to protect from "economic damage" did not see fit to intervene in these proceedings. The Examiner's rulings rejecting the kind of evidence encompassed in this paragraph is considered by Investors as "clearly erroneous." For refusing to make available Economic Counsel at the hearing, the Commission is charged with being "derelict in its obligation to protect the public interest." The explanation made earlier and below establishes conclusively that Investors' position is groundless.

The question of the "third force" has an interesting aspect. Investors summoned as its witness the chairman of the board of directors of Stone and Webster Service Corporation, (29) herein called SWS, utility consultants, a subsidiary of Stone and Webster, Inc. In April of 1963, SWS, on its own initiative, completed a study of the feasibility

and benefits of consolidating into one company the eastern members of TBS, mostly the subject carriers, CCC, and Tamiami. The study concluded that "you could get much better efficiency in one big operating unit than you can in ten smaller ones, no matter how closely they tried to operate." Representatives of the involved carriers discussed the conclusions and recommendations of the study at two open meetings, but nothing materialized. The "problem was getting the owners of all these companies in the same frame of mind at the same time. * * * and they had a group of owners that couldn't quite agree to go ahead with this deal." Thus, the "third force" upon which Investors harped so much could not even get off the ground, according to its own witness. It would be futile and inexcusable to burden the record with the theoretical and remote possibility of a "third force" under the circumstances of this case. As the Examiner stressed at the hearing, the Commission "has no application * * * for any form of approval as a result of that study, and the Commission can only act on matters before it." The instant transactions are evidenced by duly executed contracts which have not been rescinded or invalidated by a mutual act of the parties thereto. So long as this is true, and in the absence of a request by the contracting parties for dismissal of the applications, "we are required by the plain language of the statute to determine" same on their merits. Compare *Marion Trucking Co., Inc.—Purchase—Harwood Trucking,* 50 M.C.C. 613, 621, and *Black Ball Freight Service* v. *United States,* 223 F. Supp. 191, 197. Several of Queen's and GRIC's stockholders sold their depositary receipts in a "contrived market * * * without

the filing of a registration statement for at least the shares of General Realty with the SEC," without "full disclosure." If they did make such disclosure, "how would they obtain a sutainable non-taxable ruling from the IRS * * *?[15] Regardless of the form of Investors' clever phraseology, it is, in effect, alleging violations under two separate statutes, yet the Examiner has not been informed of any charges filed with the Securities and Exchange Commission and Internal Revenue Service. Suffice it to say that the depositary receipts are subject to the terms of the related agreements, including the ratios of exchange, and that the number of shares sold does not affect the control (30) of Queen and GRIC. In October of 1963, Transcon purchased for cash from a brokerage firm 21 percent of Safeway's stock. The facts of record do not warrant a finding that Transcon thereby acquired the power to exercise control or management of Safeway's operations. On July 12, 1965, in No. MC-F-9165, Greyhound filed a complaint and request for investigation, alleging that Transcon, directly or indirectly, and without the Commission's approval, has acquired a substantial portion of Queen's stock and consequently "may have

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[15] Western Sales, Limited, a Bahamian corporation, herein called Western, was a wholly-owned subsidiary of Transcon in 1964, when the latter distributed 51 percent of the shares to its own stockholders, retaining the balance. Western is a designer and seller of buses. It wholly owns the stock of Bus & Car Company, S. A., of Les Bruges, Belgium, a manufacturer of the Gold and Silver Eagle busses. It wholly owns the stock of Bus & Car Company, S. A., of Highway Insurance Company, A. G., of Zug, Switzerland, which is authorized to write all types of insurance outside of that country. It has purchased depositary receipts representing 1,387 Queen shares and 829 GRIC shares.

acquired actual control over the operations of said carrier. That there is a strong possibility that similar control may have been acquired by said persons of the operations of Virginia Stage Lines, Inc. and Safeway Trails, Inc." Transcon has filed an answer denying these allegations. It and subsidiaries filed a complaint and request for investigation on April 27, 1965, in No. MC-F-9102, alleging that Greyhound "has taken unlawful control" of another motor carrier of passengers. Nothing herein shall be construed as prejudging the issues in the last two proceedings.

It is Transcon's intention to maintain the subject carriers as separate corporate entities with the same management. In the words of its president: "Well, we have felt that our system of decentralized management and operation and ownership was more effective * * * than if we had a centralized management that has been adopted in Greyhound. We feel that the local approach to knowing what is going on in the territory by management people is much better." When reminded of the Commission's policy of encouraging corporate simplification, he remarked that "we will abide by the Commission's rulings. But, on the other side, we do feel that our policy is right." Transcon's judgment merits respect, but it is nevertheless true that corporate simplification does not exclude decentralized management and operation, and that the reasons advanced for approval of the transactions are likewise valid for such simplification. It is recommended that Transcon re-examine its policy.

The Examiner rejects Greyhound's requested findings, except Nos. 3 and 5. In connection with No. 3, he observes

that Transcon met its burden by establishing that the transactions are consistent with the public interest.

Ultimate Findings

Upon consideration of all the evidence of record, the Examiner finds:

(1) In No. MC-F-8744, that acquisition by Transcontinental Bus System, Inc., of control of Virginia Stage Lines, Incorporated, and Safeway Trails, Inc., through purchase of their outstanding capital stock, and, in turn, of Trailways of New England, Inc., Tennessee Trailways, Inc., and Service Coach Line, Inc., through such acquisition of control, upon the terms (31) and conditions previously set forth, which terms and conditions are found to be just and reasonable, constitute transactions within the scope of section 5(2)(a), and will be consistent with the public interest; *provided, however,* that if the authority herein granted is exercised, jurisdiction shall be reserved for a period of three years from the date of final consummation herein to make such additional findings and to impose such terms and conditions with respect to the employees of applicant and its affiliated companies as may be necessary and lawful, if, upon petition by them, or their representatives, within that period, it is shown that the condition of their employment or interests incident thereto have been or will be adversely affected by anything done or proposed to be done pursuant to, or as a direct result of, consummation of the transactions under the authority herein granted.

Appendix C

Application dismissed as to Carolina Scenic Stages, Coastal Stages Corporation, The Gray Line of Charleston, and Water Street Equity Corporation.

(2) In No. MC-F-8774, that acquisition by Transcontinental Bus System, Inc., of control of Queen City Coach Company through purchase of its outstanding capital stock, and, in turn, of Smoky Mountain Stages, Inc., Georgia-Florida Coaches, Inc., Fort Bragg Coach Company, Inc., and Carolina Scenic Stages, and, in turn, of Coastal Stages Corporation and The Gray Line of Charleston through such acquisition of control, upon the terms and conditions previously set forth, which terms and conditions are found to be just and reasonable, constitutes a transaction within the scope of section 5(2)(a), and will be consistent with the public interest; *provided, however,* that, if the authority herein granted is exercised, jurisdiction shall be reserved for a period of three years from the date of final consummation herein to make such additional findings and to impose such terms and conditions with respect to the employees of applicant and its affiliated companies as may be necessary and lawful, if, upon petition by them, or their representatives, within that period, it is shown that the condition of their employment or interests incident thereto have been or will be adversely affected by anything done or proposed to be done pursuant to, or as a direct result of, consummation of the transaction under the authority herein granted.

Application dismissed as to Service Coach Line, Inc.; Tennessee Trailways, Inc., and General Realty and Insurance Corporation.

(3-4) In Finance Dockets Nos. 23123 and 23159, that issuance by Transcontinental Bus System, Inc., in connection with the transactions authorized in Nos. MC-F-8744 and MC-F-8774, not exceeding 590,347 shares and 217,296 shares of its common capital stock, $1 par value each, respectively, upon the terms and conditions and for the purposes previously set forth, (a) is for a lawful object within its corporate purposes and (32) compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by Transcontinental Bus System, Inc., of service to the public as a common carrier, and which will not impair its ability to perform that service and (b) is reasonably necessary and appropriate for such purposes.

ORDER

Premises considered, it is the ORDER of the Hearing Examiner that:

(1) In No. MC-F-8744, acquisition by Transcontinental Bus System, Inc., of Dallas, Tex., of control of Virginia Stage Lines, Incorporated, of Charlottesville, Va., and Safeway Trails, Inc., of Washington, D. C., through purchase of their outstanding capital stock, and, in turn, of Trailways of New England, Inc., of Washington, Tennessee Trailways, Inc., of Knoxville, Tenn., and Service Coach Line., of Tampa, Fla., through such acquisition of control be, and it is hereby, approved and authorized, subject to the terms and conditions herein set forth.

The application, to the extent Carolina Scenic Stages and Coastal Stages Corporation, of Spartanburg, S. C., The

Gray Line of Charleston, of Charleston, S. C., and Water Street Equity Corporation, of Charlottesville, are joint parties applicant, be, and it is hereby, dismissed.

(2) In No. MC-F-8774, acquisition by Transcontinental Bus System, Inc., of control of Queen City Coach Company, of Charlotte, N. C., through purchase of its outstanding capital stock, and, in turn, of Smoky Mountain Stages, Inc., Georgia-Florida Coaches, Inc., and Fort Bragg Coach Company, Inc., all of Charlotte, and Carolina Scenic Stages, and, in turn, of Coastal Stages Corporation and The Gray Line of Charleston through such acquisition of control, be, and it is hereby, approved and authorized, subject to the terms and conditions herein set forth.

The application, to the extent Service Coach Line, Inc., Tennessee Trailways, Inc., and General Realty and Insurance Corporation are joint parties applicant, be, and it is hereby, dismissed.

(3-4) In Finance Dockets Nos. 23123 and 23159, in connection with the transactions authorized in Nos. MC-F-8744 and MC-F-8774, Transcontinental Bus System, Inc., be, and it is hereby, authorized to issue not exceeding 590-347 shares and 217,296 shares of its common capital stock, $1 par value each, respectively, for the purposes all upon the terms and conditions set forth herein.

If the parties to the transactions authorized in Nos. MC-F-8744 and MC-F-8774 desire to consummate same, they shall confirm in writing to the Commission, immediately after consummation, the dates on which consummation has actually taken place.

(33) If the authority herein granted is exercised, Transcontinental Bus System, Inc., shall submit for consideration, in each proceeding, a sworn statement, and one copy thereof, showing all expenditures made, by dates, or to be made, in connection with the transaction authorized, including the consideration, legal and other fees, commissions, witness fees, and any other costs incidental to the transaction, the assets acquired and the liabilities assumed, indicating the account number and title to which each item has been, or is to be, debited or credited.

The authority herein granted shall not be exercised prior to the date of service of a notice or order stating that this Recommended Order has become the order of the Commission.

Unless the authority herein granted is exercised within 180 days from the date of service of such notice or order, this order shall be of no further force and effect.

Except as otherwise authorized, the stock authorized to be issued in Finance Dockets Nos. 23123 and 23159 shall not be sold, pledged, repledged, or otherwise disposed of by Transcontinental Bus System, Inc., unless and until so ordered or approved by the Commission.

Transcontinental Bus System, Inc., shall report concerning the matters involved in Finance Dockets Nos. 23123 and 23159 in conformity with the order of the Commission, Division 3, dated May 20, 1964, respecting applications filed under section 214 of the Interstate Commerce Act (49 CFR 56.6).

Nothing herein contained shall be construed to imply any guarantee or obligation as to said stock, or dividend thereon, on the part of the United States.

Appendix C

The recital in said report of balance sheet and other financial data shall not be construed as approving accounting methods which have been followed or expenditures represented thereby.

By the Commission, M. L. Winson, Hearing Examiner.

Dated at Washington, D. C., this 19th day of October, 1965.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX D

Statutes Involved

Motor Carrier Act of August 9, 1935, ch. 498, § 202(a), 49 Stat. 543:

DECLARATION OF POLICY AND DELEGATION OF JURISDICTION

SEC. 202. (a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.

Interstate Commerce Act of September 18, 1940, ch. 722, Title I, § 1, 54 Stat. 899:

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the

provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Interstate Commerce Act § 5(2)(a)(b)(c), 49 U.S.C. § 5(2)(a)(b)(c):

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire con-

trol of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed

transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

Interstate Commerce Act § 5(4), 49 U.S.C. § 5(4):

(4) It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subdivision (a) of paragraph (2) of this section, or to accomplish or effectuate, or

to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5) of this section, the words "control or management" shall be construed to include the power to exercise control or management.

Interstate Commerce Act § 5(11), 49 U.S.C. § 5(11):

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority;

and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

Clayton Act § 7, 15 U.S.C. § 18:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and

no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier, from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the

company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securitie and Exchange Commission in the exercie of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

Clayton Act § 11(a)(b), 15 U.S.C. § 21(a)(b):

(a) Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers

engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

(b) Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in

which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission or Board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission or Board may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission or Board conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

Appendix D

18 U.S.C. § 371:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1505:

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand duly and properly made under the Antitrust Civil Process Act willfully removes from any place,

conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1621:

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

Appendix D

Internal Revenue Code of 1954, § 368 (a)(1)(B):

(a) Reorganization.—

(1) In general.—For purposes of parts I and II and this part, the term "reorganization" means—

* * *

(B) the acquisition by one corporation, in exchange solely for all or a part of its voting stock (or in exchange solely for all or a part of the voting stock of a corporation which is in control of the acquiring corporation), of stock of another corporation if, immediately after the acquisition, the acquiring corporation has control of such other corporation (whether or not such acquiring corporation had control immediately before the acquisition);

APPENDIX E

Initial Brief of Applicant Prior to Examiner's Report and Recommended Order, Filed in the Commission on January 25, 1965, pp. 77-93 (R. 53).

INFORMATION CONCERNING PRIOR ACQUISITIONS OF GREYHOUND

Name	*Remarks*	*Date*	*Citation*
Illinois Greyhound Lines, Inc.	100% Stock	1/ 1/36	1 M.C.C. 78
Ohio Greyhound Lines, Inc.	100% Stock		
Teche Lines, Inc.	78.77% Stock		
Pacific Greyhound Lines, Inc.	60.95% Stock		
Dixie Greyhound Lines, Inc.	57.08% Stock		
Atlantic Greyhound Lines, Inc.	56.03% Stock		
Richmond Greyhound Lines, Inc.	51% Stock		
Central Greyhound Lines, Inc.	50% Stock		
Pennsylvania Greyhound Lines, Inc.	50% Stock		
Capitol Greyhound Lines	50% Stock		
Northland Greyhound Lines, Inc.	45.11% Stock		
Southwestern Greyhound Lines, Inc.	16.67% Stock		
Western Greyhound Lines, Inc.	79.31% Stock		
Atlantic Greyhound Corporation	56.03% Stock	11/27/36	1 M.C.C. 342
Southwestern Greyhound Lines, Inc.	67.67% Stock		
Capitol Greyhound Lines, Inc.	100% Stock		

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Name	*Remarks*	*Date*	*Citation*
Ohio Greyhound Lines, Inc.	100% Stock		
Illinois Greyhound Lines, Inc.	100% Stock		
Richmond Greyhound Lines, Inc.	51% Stock		
Dixie Greyhound Lines, Inc.	100% Stock		
New England Greyhound Lines, Inc.	100% Stock		
Oliver Coach Lines, Inc.	Purchased by Dixie Greyhound	11/23/37	5 M.C.C. 211
Red Star Way, Inc.	Portions purchased by Ohio Greyhound Lines	6/14/38	5 M.C.C. 607
White Star Motor Lines of Illinois	Portions purchased by Illinois Greyhound Lines	9/23/38	15 M.C.C. 86
Peninsula Transit Corporation	Portions purchased by Capitol Greyhound Lines	12/27/38	15 M.C.C. 459
Quaker Stages, Inc.	Portions purchased by The Greyhound Corporation	12/30/38	15 M.C.C. 533
Old Colony Coach Company	100% Stock		
New England Trans. Co.	Portions purchased by New England Greyhound Lines	12/30/38	15 M.C.C. 536
Victoria Coach Co., Inc.			
Berkshire Motor Coach Lines, Inc.			

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Name	*Remarks*	*Date*	*Citation*
Independent Bus Corporation E. O. Woodie Trans. Company	Purchased by Atlantic Greyhound Lines	3/22/39	25 M.C.C. 1
Central Greyhound Lines Northland Greyhound Lines	55% Stock 55% Stock	4/ 6/39	25 M.C.C. 59
Hiawatha Trails, Inc. Sioux Limited Lines Northwestern Motor Bus Grey Transportation	Portions purchased by Northland Greyhound Lines	4/17/39	25 M.C.C. 109
Lee Way Stages	Portions purchased by Southwestern Lines	5/23/39	25 M.C.C. 195
Stokes Bus Line	Purchased by Atlantic Greyhound Lines	8/31/40	35 M.C.C. 679
Canadian Greyhound Lines, Ltd. Toronto Greyhound Lines, Ltd.	51% Stock 51% Stock	7/10/40	35 M.C.C. 599
Teche Greyhound Lines	Merged	2/ 3/41	36 M.C.C. 397
Eastern Michigan Motor Buses Eastern Michigan Trans. Co.	Control	2/ 4/41	36 M.C.C. 413
Peninsula Transit Corporation	Merged with Richmond Greyhound Lines	6/ 9/41	36 M.C.C. 747

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Name	*Remarks*	*Date*	*Citation*
Lee Way Stages	Portions purchased by Southwestern Greyhound Lines	6/11/41	36 M.C.C. 753
New Mexico Transportation Co.	45% Stock—Southwestern Greyhound Lines		
Pacific Southland Stages, Inc.	Merged with Pacific Greyhound Lines	12/12/41	37 M.C.C. 654
Taho Greyhound Lines			
Champlain Bus Corp.	Purchased by Central Greyhound Lines	12/ 3/42	38 M.C.C. 777
Carolina Motor Bus Lines	Portions purchased by Atlantic Greyhound	2/10/43	39 M.C.C. 31
Chillicothe-Jackson Coach Co.	Purchased by Atlantic Greyhound	7/ 6/44	39 M.C.C. 819
Pan American Bus Lines	Purchased by Atlantic Greyhound	2/20/42	38 M.C.C. 433
Orange Lines	Purchased by Northland Greyhound Lines	11/16/45	40 M.C.C. 295
Cincinnati and Lake Erie Trans. Company	30.57% Stock	10/16/45	40 M.C.C. 338
Penn-Ohio Stage Lines	Control	12/11/45	40 M.C.C. 388
Valley Public Service			
Balcher Bros. Motor Coaches	Purchased by Great Lakes Greyhound Lines	1/ 1/45	40 M.C.C. 804

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Name	*Remarks*	*Date*	*Citation*
Foster Bus Lines	Purchased by Great Lakes Greyhound Lines	3/15/45	40 M.C.C. 815
Florida Greyhound Lines	Control	11/30/45	40 M.C.C. 802
Enders Bus Lines, Inc.	Merged with Central Greyhound Lines, Inc.	7/23/46	45 M.C.C. 33
White Star Coach Lines	Portions purchased by Central Greyhound		
Cincinnati and Lake Erie Trans. Co.	100% Stock	10/ 4/46	45 M.C.C. 143
Springfield-Delaware Bus Company			
Hamilton City Lines			
Lima City Lines, Inc.			
Community Transit Lines	Purchased by Atlantic Greyhound Lines	6/12/47	45 M.C.C. 670
Thendors Bus Lines	Portions purchased by Atlantic Greyhound		
Southern Kansas Greyhound Lines	50% Stock	6/20/47	45 M.C.C. 679
Southern Kansas Lines	Portions purchased by The Greyhound Corporation		
Interstate Transit Lines	Portions purchased by Northland Greyhound Lines	9/20/46	45 M.C.C. 808
Westbridge Trans. Co.	Control	10/10/46	45 M.C.C. 804
Buffalo and Erie Coach Corp.			

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Name	*Remarks*	*Date*	*Citation*
Washington Motor Coach Company	Control	2/ 3/47	45 M.C.C. 821
Blackhawk Motor Transit Company	Purchased by Illinois Greyhound Lines	4/ 1/47	45 M.C.C. 820
White Bus Lines	Portions purchased by Central Greyhound Lines	10/10/47	50 M.C.C. 807
O.C.&N. Stages, Inc. Inland Stages	Merged with Pacific Greyhound Lines	11/19/47	50 M.C.C. 123
King Brothers Company	Purchased by Great Lakes Greyhound	12/ 8/47	50 M.C.C. 237
Northeastern Missouri Greyhound Lines	Purchased by Southwestern Greyhound Lines	2/31/48	50 M.C.C. 441
Elmira-Ithaca Trans. Company	Purchased by Central Greyhound Lines	2/ 3/48	50 M.C.C. 818
North Star Lines	Purchased by Central Greyhound Lines	4/21/48	50 M.C.C. 821
Yellow Bus Lines	Purchased by Great Lakes Greyhound	8/24/48	50 M.C.C. 831
*Central Greyhound Lines *Great Lakes Greyhound Lines *Illinois Greyhound Lines *Ohio Greyhound Lines	Merged with the Greyhound Corporation	11/16/48	55 M.C.C. 237
*Central Greyhound Lines	100% Stock		

* Entries marked with an asterisk are not included in the total of 121 cited p. 7n.**, *supra,* because Greyhound had already acquired control of these companies through other transactions reflected in this listing.

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Name	*Remarks*	*Date*	*Citation*
Oregon Motor Coaches	Joint control by Pacific Greyhound Lines and The Greyhound Corporation	12/31/48	55 M.C.C. 321
North Coast Transportation Company	Purchased by the Greyhound Corporation	10/ 8/48	55 M.C.C. 801
Midland Coach Lines	Purchased by Northland Greyhound Lines	5/20/49	55 M.C.C. 804
Bellville-St. Louis Coach Co.	Purchased by Dixie Greyhound Lines	5/15/49	55 M.C.C. 819
*Dixie Greyhound Lines *Florida Greyhound Lines *North West Greyhound Lines *North Coast Greyhound Lines	Merged with The Greyhound Corporation	11/29/49	56 M.C.C. 238
West Ridge Transportation Company	Merged with The Greyhound Corporation	3/20/50	56 M.C.C. 349
Buffalo and Erie Coach Company	Purchased by Central Greyhound Lines		
Central Coach Lines, Inc.	Purchased jointly by The Greyhound Corporation and Indiana Greyhound Lines	9/ 5/50	57 M.C.C. 33

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Name	*Remarks*	*Date*	*Citation*
*Southeastern Greyhound Lines	Merged with The Greyhound Corporation	10/ 3/50	57 M.C.C. 123
Alaga Coach Lines and Southeastern Greyhound of Indiana	Control by Greyhound Corporation		
Ernest R. & Archie C. McLaughlin	Purchased by The Greyhound Corporation	1/15/51	57 M.C.C. 806
W. J. Foster	Purchased by New England Greyhound Lines	2/13/51	57 M.C.C. 807
Charlestown Bus Line & Equipment Co., Inc.	Portion purchased by The Greyhound Corporation	1/24/51	57 M.C.C. 803
Walter M. & Paul Fulkenhagen	Purchased by Northland Greyhound Lines	4/23/51	57 M.C.C. 807
Triangle Transportation Co.	Portion purchased by Northland Greyhound Lines	4/23/51	57 M.C.C. 807
Airline Bus Company	Purchased by Pacific Greyhound Lines	8/20/51	57 M.C.C. 808
Southeastern Greyhound Lines of Indiana	Merged with The Greyhound Corporation	6/ 7/51	57 M.C.C. 808
Alaga Coach Line	Merged with The Greyhound Corporation	10/ 3/51	58 M.C.C. 804

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Name	*Remarks*	*Date*	*Citation*
Olot M. Lundquist	Purchased by Northland Greyhound Lines	9/24/51	58 M.C.C. 804
Sun Valley Bus Lines	Portion purchased by Pacific Greyhound Lines	11/27/51	58 M.C.C. 806
Harold A. & Orville T. Stoy	Purchased by Pacific Greyhound Lines	2/14/52	58 M.C.C. 807
Interstate Transit Lines, et al.	Control by and merged with The Greyhound Corporation	7/30/52	58 M.C.C. 809
Robert H. Finley	Purchased by Northwestern Missouri Greyhound Lines—Control by Southwestern Greyhound Lines and Greyhound Corporation	8/26/52	58 M.C.C. 810
*Interstate Transit Lines, Inc.	Merged with The Greyhound Corporation	11/28/52	58 M.C.C. 811
Oregon Motor Stages	Purchased by Pacific Greyhound Lines	12/22/53	59 M.C.C. 657
International Coach Lines, Inc.	Purchased by New England Greyhound Lines	12/22/53	59 M.C.C. 806
B. C. Motor Transportation, Ltd.	Portion purchased by The Greyhound Corporation	11/26/54	60 M.C.C. 643

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Name	*Remarks*	*Date*	*Citation*
Pennsylvania Greyhound Lines	Control by and merged with The Greyhound Corporation	5/10/54	60 M.C.C. 803
Pennsylvania Greyhound Lines of Virginia and Pennsylvania Greyhound Lines of Indiana	Control by The Greyhound Corporation		
Capital Greyhound Lines	Control by The Greyhound Corporation	11/ 3/54	60 M.C.C. 804
New England Greyhound Lines	Merged with The Greyhound Corporation	11/10/54	60 M.C.C. 804
Southern Limited, Inc.	Control by and merged with The Greyhound Corporation	12/21/54	60 M.C.C. 804
Golden Gate Transit Lines	Purchased by Pacific Greyhound Lines	7/ 6/55	65 M.C.C. 347
Penn Bus Co.	Control by and merged with The Greyhound Corporation	4/26/55	65 M.C.C. 804
The Blue Ridge Transportation and White Star Lines, Inc.	Purchase by the Greyhound Corporation	4/26/55	65 M.C.C. 804
Maine Central Transportation Co.	Control by and merged with The Greyhound Corporation	4/ 5/56	65 M.C.C. 804

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Name	*Remarks*	*Date*	*Citation*
*Capitol Greyhound Lines	Merged with The Greyhound Corporation	3/24/55	65 M.C.C. 809
West Virginia Transportation Co.	Purchased by Capitol Greyhound Lines and Atlantic Greyhound Corporation	9/29/55	65 M.C.C. 809
*Central Greyhound Lines of New York	Merged with the Greyhound Corporation	10/10/55	65 M.C.C. 810
Gulf Transport Company	Portion purchased by The Greyhound Corporation	5/31/56	65 M.C.C. 815
*Northland Greyhound Lines	Merged with The Greyhound Corporation	6/25/56	65 M.C.C. 816
*Pacific Greyhound Lines	Merged with the Greyhound Corporation	7/30/56	70 M.C.C. 59
California Parlor Car Tours, Company	Control by The Greyhound Corporation through the merger		
Boston & Maine Transportation Company	Portion purchased by The Greyhound Corporation	4/ 1/57	70 M.C.C. 801
Eastern Canadian Greyhound Lines, Ltd.	Purchase by The Greyhound Corporation	10/ 7/57	70 M.C.C. 806
Auto Interurban Company	Portion purchased by The Greyhound Corporation	10/10/56	70 M.C.C. 811

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Name	*Remarks*	*Date*	*Citation*
*Southwestern Greyhound Lines	Merged with The Greyhound Corporation	7/ 8/58	75 M.C.C. 339
*Northeastern Missouri Greyhound Kerrville Bus Lines	Control by The Greyhound Corporation		
*Atlantic Greyhound Corporation	Merged with The Greyhound Corporation	6/15/59	80 M.C.C. 802
*Greyhound Lines, Inc.	Took over all interstate rights of Greyhound Corporation.	10/25/63	93 M.C.C. 392

Transcontinental is but a stripling compared with Greyhound, either in years or in size. Formed in 1947, it too has grown by means of acquisitions. The route system of Continental Trailways is depicted in Exhibit No. 1. According to Greyhound's Exhibit No. 148, Transcontinental's route system presently encompasses 45,575 certificated miles. After consummation, that same exhibit shows that Transcontinental would have a total of 56,435 route miles, or an increase of 23.8%. Greyhound is saying, in effect, that a 23.8% increase, all at one time, is just too much to allow one of its competitors to have, even though it has done that and more a number of times in the past. Below is presented a chart which shows the growth of Transcontinental since 1947, by way of acquisitions.

INFORMATION CONCERNING PRIOR ACQUISITIONS OF TRANSCONTINENTAL

Name	*Remarks*	*Date*	*Citation*
Bowen Motor Coaches	Acquired by Lone Star Coaches, Subsequently to become Continental Bus System, Inc.	9/ 1/44	39 M.C.C. 832
Panhandle Stages, Inc.	Joint control by Lone Star Coaches A. F. Heckett	10/ 8/46	45 M.C.C. 809
Continental Bus System, Inc.	Formerly Lone Star Coaches Direct control by Transcontinental	2/10/48	50 M.C.C. 193, 305
Continental Panhandle Lines, Inc.	Formerly Panhandle Stages, Incorporated—Joint Control by Transcontinental and A. F. Heckett		58 M.C.C. 801
Texas, New Mexico and Oklahoma Coaches, Inc.	Dismissed. 39% held not to constitute control		
Union Bus Lines, Inc.	Dismissed. 30% held not to constitute control.		
Central Division of Transcontinental	Formerly Santa Fe Trail Transportation Company	2/10/48	50 M.C.C. 193, 305
Dixie Division of Transcontinental	Formerly Dixie Motor Coach Corporation		58 M.C.C. 801
Western Division of Transcontinental	Formerly Santa Fe Trail Transportation Company		

Name	*Remarks*	*Date*	*Citation*
Southern Kansas Greyhound Lines, Inc.	Joint control by Transcontinental and The Greyhound Corporation		
West Coast Bus Lines, Ltd.	Dismissed. 30% held not to constitute control		
Continental Pacific Lines, Inc.	Formerly West Coast Bus Lines, Ltd. Direct control by Transcontinental	5/20/48	50 M.C.C. 525
Rocky Mountain Division of Continental Bus System	Formerly Rio Grande Motorway, Inc.	7/24/52	55 M.C.C. 31, 235 58 M.C.C. 801
Denver-Colorado Springs-Pueblo Motorway, Inc.	Joint control by Continental Bus System, Inc. and Burlington. Indirect control jointly by Transcontinental and American Buslines, Inc.	7/24/52	55 M.C.C. 31, 235 58 M.C.C. 801
Continental Southern Lines, Inc.	Formerly Southern Bus Lines, Inc. Direct control by Transcontinental	8/19/49	56 M.C.C. 803
Valley Transit Lines, Inc.	Direct control by Transcontinental	8/29/52	58 M.C.C. 805
American Buslines, Inc.	Direct control by Transcontinental	5/ 7/53	59 M.C.C. 233, 250
Gibson Lines	Indirect control through American		

Name	*Remarks*	*Date*	*Citation*
Muscatine, Davenport and Clinton Bus Company	Indirect control through American		
Denver-Salt Lake-Pacific Stages, Inc.	Joint control with American		
Denver-Colorado Springs-Pueblo Motorway, Inc.	Joint control with American		
Continental Crescent Lines, Inc.	Formerly Crescent Stages, Inc. Indirect control through Continental Southern Lines, Inc.	10/13/53	59 M.C.C. 491
Continental Tennessee Lines, Inc.	Formerly Central Bus Lines, Inc Indirect control through Continental Southern Lines, Inc.	10/13/53	59 M.C.C. 805
Smoky Mountain Stages, Inc.	Joint control by Transcontinental and Queen City Coach Company	8/29/56	70 M.C.C. 77
Union Bus Lines, Inc. Randolph Field Bus Company, Inc.	Indirect control through Continental Bus System, Inc.	1/19/56	65 M.C.C. 803
Bayshore Buslines, Inc.	Indirect control through Continental Southern Lines, Inc.	5/10/55	65 M.C.C. 805

Name	*Remarks*	*Date*	*Citation*
Arkansas Motor Coaches, Ltd., Inc.	Direct control by Transcontinental	10/4/56	70 M.C.C. 809
*American Buslines, Inc. *Gibson Lines *Muscatine Davenport & Clinton Bus Company *Denver-Salt Lake-Pacific Stages, Inc. *Denver-Colorado Springs-Pueblo Motorway, Inc.	Joint control by Transportation Properties, Inc. and Continental Southern Lines, Inc. during Chapter X Reorganization	9/10/58	75 M.C.C. 471
Denver-Colorado Springs-Pueblo Motorway, Inc.	Direct control by Transcontinental	5/10/60	85 M.C.C. 383
Denver-Salt Lake-Pacific Stages, Inc.	Direct control by Transcontinental	5/10/60	85 M.C.C. 383
Continental Crescent Lines, Inc. Continental Tennessee Lines, Inc.	Direct control by Transcontinental Direct control by Transcontinental	5/18/60	Not Printed
*American Buslines, Inc. *Gibson Lines *Muscatine, Davenport & Clinton Bus Company	Indirect control through Continental Southern Lines, Inc.	8/ 4/60	85 M.C.C. 628
Midwest Buslines, Inc.	Indirect control through American Buslines, Inc.	10/25/60	Not Printed

* Entries marked with an asterisk are not included in the total of 34 cited p. 7n***, *supra,* because Transcon had already acquired control of these companies through other transactions reflected in this listing.

Name	*Remarks*	*Date*	*Citation*
Tennessee Trailways Inc.	Formerly Tennessee Coach Company. Joint control by Virginia Stage Lines, Incorporated, Continental Tennessee Lines, Inc. and Smoky Mountain Stages, Inc. Indirect control by Transcontinental and Queen City Coach Company	12/21/61	87 M.C.C. 775
*American Buslines, Inc.	Direct control by Transcontinental	12/29/61	87 M.C.C. 795
*Gibson Lines	Indirect control through American		
*Muscatine, Davenport & Clinton Bus Company	Indirect control through American		
*Midwest Buslines, Inc.	Direct control by Transcontinental		
*Randolph Field Bus Company, Inc.	Direct control by Transcontinental		
*Denver-Salt Lake-Pacific Stages, Inc.	Direct control by Transcontinental		
*Union Bus Lines, Inc.	Direct control by Transcontinental		

* Entries marked with an asterisk are not included in the total of 34 cited in footnote * * * to p. , *supra,* because Transcon had already acquired control of these companies through other transactions reflected in this listing.

APPENDIX F

Joint Brief of the United States of America and the Interstate Commerce Commission, Filed in the Court below on May 11, 1967, p. 40 n. 16 (R. 54).

Upon receipt of plaintiff's brief in February of 1967, making serious charges of fraud, "counsel for the Commission and for the United States examined the matter and were advised of the likelihood that Transcon's counsel, Goff, and its Secretary-Treasurer Hamilton had personally participated in the purchase of the receipts by the subsidiary. This was subsequently confirmed by Mr. Goff, who further stated that to the best of his knowledge all the purchases were made by himself, or by Hamilton, or by Scheitel, or by Robinson. In our view it certainly would have been preferable had this information been made available at the hearing, even though it was not material to the ultimate decision. However, the Commission was fully aware that the subsidiary which was controlled by Transcon had acquired the receipts and it attributed the purchases to Transcon. It nevertheless approved the transaction as consistent with the public interest. Thus, the identity of the Transcon officers involved in the purchases of the receipts by the subsidiary was immaterial to the Commission's decision.

Transcon's Answering Brief, Filed in the Court Below on May 12, 1967, pp. 25-26 (R. 57)

Indeed, within a week following the hearings, the General Counsel of Transcon, Mr. Goff, furnished representatives of the Commission's Bureau of Enforcement, upon the latter's inquiry, with all records concerning Highway's purchases

of depositary receipts. Stock purchases were made by Messrs. Goff or Hamilton or Scheitel or Robinson. There was no reason to withhold disclosure of Highway's acquisition of rights to less than 10% of Queen stock and of rights to less than 2% of Virginia stock; nor was there any occasion to disclose these acquisitions. Transcon had made no secret of its 1963 acquisition of 21% of Safeway and no one at the hearings, including Interstate ever challenged such acquisition as being unlawful. Obviously, if either Greyhound or Interstate or the Hearing Examiner thought that the acquisition of 21% of Safeway was of no significance, they would certainly not attach any significance to the acquisition of 2% of Virginia or less than 10% of Queen. (Footnote omitted.)

Transcript of Hearing Before the District Court, May 25, 1967, pp. 115-116, 126 (R. 67)

Judge Feinberg: And the question posed by plaintiff is assuming that he had answered it that way, would that have made any difference to the Interstate Commerce Commission and shouldn't this Court consider carefully whether the Interstate Commerce Commission would have reached the same conclusions if it had received more candid answers?

Mr. Castles: I think there is just no question whatsoever that if there put on the record here, as it was subsequently before the examiners report came out, exactly what these purchasers had been the result would have been exactly the same and I say that because the pattern of sales that were actually made show that there was no agreement. The prices were different from each other. The sales were for different (116) amounts. There was no constant relation-

ship between the price paid for the depository receipts and the market price of Transcontinental stock. These things were all clearly ad hoc arrangements and, as you heard the Interstate argument this morning, they said that the key to all this is that letter of April 28th where Queen wrote a letter to Transcontinental and that I had said that one of the integral conditions of your sale is that you would buy back the Transcontinental stock at $31.25 or something which came out to $250 a share of Queen stock.

If you look at the sales, your Honor, it shows that $250—that the prices ranged all over the place. They ranged from $241.25 to $290, and I prepared for the Court a schedule which contains the dates, the prices, the amounts and the individual sellers of each and every one of these transactions comprising the 2,004 shares which I'd be happy to hand up to the Court. (See attached.)

• • • •

(126) Judge Feinberg: Aren't you concerned about less than candid testimony?

Mr. Nelson: Very much so, your Honor. As a matter of fact, I'm the one that ran into this matter of who the four people were. It is through our efforts that the matter is here. We wanted it here. We wanted the Court to see it. We insisted on it.

Now, it is our position on this that we are not vouching for the credibility of the testimony of the witnesses insofar as they gave testimony which may be read as denials of knowledge of purchases. If the testimony can be read that way, and some of it can, it is false, and it is clearly false as to Sheitel who is named as one of the four people that did the buying. There is no question about that. The question is what does this all mean?

QUEEN DEPOSITORY RECEIPTS SOLD TO HIGHWAY

SELLER	DATE OF SALE	TOTAL SHARES OWNED	SHARES SOLD	PRICE/SHARE PAID BY TRANSCON	PRICE/SHARE RECEIVED BY SELLER	TOTAL PAID BY TRANSCON	TRANSCON STOCK PRICE BID	TRANSCON STOCK PRICE ASKED	VALUE OF TRANSCON STOCK	DISCOUNT TO HIGHWAY
Mrs. J. E. Cross	6/15/64	66	66	$290		$19,206	43	43¼	$311.75	7%
Mrs. M. Rowland	6/15/64	339	312	$290		$90,480	43	43¼	$311.75	7%
Bruce Love	7/ 1/64	315	48	$265	$260	$12,720	42¼	42¾	$309.43	11%
Susan Hardison	7/ 1/64	409	20	$260		$ 5,200	42¼	42¾	$309.43	11%
H. H. Hardison, Sr.	7/ 1/64	736	173	$260		$64,980	42¼	42¾	$309.43	16%
A. M. Hardison	7/ 1/64	417	40	$260		$10,400	42¼	42¾	$309.43	16%
Goodbody & Co. (believed to be James F. Martin)	7/22/64	1364	300	$250		$75,000	40½	41	$293.63	15%
L. A. Love, Sr.	7/24/64	1004	296	$250	$247.50	$74,000	40½	42¾	$293.63	15%
Goodbody & Co. (believed to be James F. Martin)	8/21/64	1364	50	$250		$12,500	41½	42½	$300.88	17%
H. H. Hardison, Jr.	9/ 4/64	537	82	$260	$245	$21,238	37¼	37¾	$270.06	5%
Bruce Love	12/ 4/64	315	32	$267	$265	$ 8,560	41½	42	$300.88	12%
L. A. Love, Jr.	12/28/64	350	85	$252		$21,420	39½	40	$286.38	12%
H. H. Hardison, Jr.	1/ 8/65	537	300	$241.25		$72,375	39½	40	$286.38	16%
Goodbody & Co. (believed to be James F. Martin)	8/23/65	1364	200	$250		$50,000	37⅞	38⅛	$274.23	17%

APPENDIX G

Transcript of Hearing Before Examiner, pp. 200-04, 851-53, 865, 971-73 (R. 53).

Scheitel (200-04):

(200) Q. Has Transcontinental at any time advised people where, the shareholders where they could find a market for the depository receipts? A. Yes, sir. The depository receipts were issued on the basis that they were marketable, and if they could find a market, fine.

Q. Did Transcontinental advise them where they could find such a market? A. We told them that they should go to their brokers.

Q. Did you suggest the name of a broker? A. We suggested the possibility of Goodbody and Company, that made a market in Transcontinental stock, might be interested, yes, sir.

Q. Have you made any back-up arrangement with Goodbody and Company? A. No, sir.

Q. Is there any privity between Goodbody and any stockholder or director of Transcontinental? A. No, sir.

Q. And, to your knowledge, have the trust receipts been marketed? A. I understand, I think somebody sold, yes.

Q. Was it a part of your prior negotiations on the consider- (201) ation that there would be such a market? A. No, sir.

Q. Did you suggest that there would be a discount on the marketed price in relation to Transcontinental shares? A. That is strictly between the broker and them.

Q. Do I answer your—you at no time told Mr. L. A. Love or any member of the Love family that the discount would be ten to fifteen percent over the market price of

Transcontinental shares? A. If we were asked, we were advised as to what the market situation would be. I don't know what the market situation would be.

Q. You at no time discussed with any member of the Love family, or any other principal stockholder—there are five principal stockholders of Queen—the relative amount of discount that would be available to them at Goodbody and Company, that it would be ten or fifteen percent over the equivalent market price of shares of Transcontinental Bus System? A. I don't—we didn't even—there wasn't any assurance on our part at all that there was going to be a market for the depository receipts.

Q. You did refer them to Goodbody & Company? A. I said that Goodbody & Company possibly could make a mar—might find an investor for them if they wanted to sell.

(202) Q. You had no prior discussions with Goodbody & Company before you pointed them to Goodbody & Company? A. I did not.

Q. Nor anybody on the Board of Transcontinental Bus System? A. No, sir, not to my knowledge.

Q. But you are aware that some had been sold, so that the list of shareholders appended to the contract may be a different list than the people who actually take up the Transcontinental shares? A. It may be.

Q. And you had no conversations with people about the discount? It was not a part of the consideration, the persuasiveness to take your deal, that those who wanted cash could get cash from Goodbody & Company? A. No, sir.

Q. Why would you select Goodbody & Company out of all the brokerage firms in the southeastern United States?

A. It just happens to be one I know that makes a market in Transcontinental stock.

Q. Well, if—you will concede that if this transaction is not approved by the Commission, what Goodbody & Company is making a market in is not Transcontinental stock, but in Queen City stock, for which there is no market? A. I don't know that they are making a market in Queen City stock.

(203) Q. But you know that some has been sold? A. I don't know who bought it.

Q. Pardon me? A. Queen City—repeat your question, please.

Q. You know that some has been sold? A. I was told some was sold.

Q. You say there was no part of your prior discussions with the selling—holding shareholders that there would be a market for their trust receipts provided by Goodbody & Company? A. No, sir.

Q. I asked you, how did you select the name Goodbody & Company? A. I just told you. It is one that I know makes a market in Transcontinental stock, and we told them that they possibly would find them an investor that wanted to invest in this stock.

Q. But you concede that the trust receipts, if the Commission does not approve this transaction, will result in Goodbody & Company having made a market in Queen City shares rather than Transcontinental Bus shares? A. They will own Queen City shares, or whoever bought them will own Queen City shares. I am sure they acted as agent.

I don't know anthing about the brokerage business. I

don't think they can make a market in Queen City shares. It is (204) not a listed stock. I don't know.

Q. But the name Goodbody & Company came from you? A. Yes.

Mr. Callaway: Mr. Examiner, this gentleman has testified over and over and over.

Exam. Winson: Yes. It is getting to be an argument.

Mr. Burt: No, I just wanted to try—

Exam. Winson: He is answering you.

Q. (By Mr. Burt) You did say before that until the Commission approves this, you are not in control of Queen City? A. Definitely not.

Q. Letters and telegrams were addressed to the shareholders and directors of Queen City, and then you answered them, your company answered those letters, is that true? A. As I recall, we had a letter, a copy of a letter from you addressed to Mr. Moore in Dallas.

Q. Well, I will show you this letter here.

Mr. Burt: Would you mark it as an exhibit?

Mr. Goff: Counsel, I don't know that these questions should be directed to this witness. I wrote that letter, and my signature is on it.

Mr. Burt: Well, this applies to negotiations and whether control—I am not getting into—this is off the record?

Exam. Winson: Off the record.

(Discussion off the record.)

* * * * * *

Love (851-53, 865):

(851) (By Mr. Burt) Mr. Love, at any time—oh, back on the subject of the conditions, and so on, the prerequisite conditions to the executing of the contract at 7.25 to one. To your knowledge, sir, did any of the shareholders want cash and not 7.25 shares to one? A. I don't believe I know of any of them that took that. Some of them have sold some of their depository receipts.

Q. Did they want any assurance that there would be a market for the depository receipts? A. No, sir, not that I know of.

Q. Were you ever told that there would be a market for the receipts that you took? A. No, sir, I wasn't told definitely there would be any market for them.

Q. Was it formerly suggested to you by anyone that somebody might be willing to buy some at a ten percent discount over the market price of Transcontinental shares the day you tendered them? A. I don't recall. I taken that up with those people in Charlotte myself.

Q. Mr. Love, did you happen to select the First Securities (852) Corporation yourself? I mean, how did you happen to go tender this unknown document? A. Bruce Love sold a few of his shares to them. I think he knew one of the fellows that worked there with them.

Q. And they said that they would make a market in these shares? A. They said they thought they would have a market for them in a few days, and give them the price I'd take for it and give them a few days and they'd have a market for it.

Q. They had a market. Did they tell you, indicate where they were getting a market for it? A. No, sir, they did not.

Q. To your knowledge, had any of the shares of Queen City ever been traded, changed hands except through a death in a family, we will say, for many years? A. What?

Q. For many years, had any of the shareholdings of Queen City, as shown on this list here, to your knowledge, had there been any substantial or any transfers of shares amongst the shareholders to outsiders or amongst themselves, except as a result of death? A. Since the trade was made?

Q. No, sir. We will say ten years prior to May 16th. A. No, I don't believe there have.

Q. So there has been no trading in the shares of Queen City? (853) A. I don't believe so.

Q. Had you taken the shares of Queen City to a bank to borrow on them, or to sell them, would there have been any knowledge about what they were worth?

Mr. Goff: On whose part?

The Witness: I don't know of anybody that put any up.

Q. (By Mr. Burt) All right, sir. You—Document No. 98 shows that you were able to sell, on July 24th, $73,000 worth. A. That's right.

Q. There was no arrangement in advance brought to your attention for the sale of those depository receipts through that First Securities Corporation? A. No, sir, I don't believe there was.

Q. Pure choice. Sir, I show you another document that has been produced down there. It is a depository receipt of Herman Hardison, First National Bank of Anson County.

Mr. Goff: Now, before this ever even gets started, Mr. Examiner, this witness cannot identify anything that Herman Hardison ever had anything to do with. This just isn't the man to prove this document up by, the wrong man. This isn't Mr. Hardison, this is Mr. Love. This document purports to have something to do with Mr. Hardison. This isn't the right man to do it with.

* * * * * *

(865) Q. Do you know, Mr. Love, who actually bought your depository receipts? A. No, sir, I don't. The security company on here sent me a check for them, that's all I know.

Q. They didn't give you any indication who bought the receipts? A. They did not.

Q. Do you know of any others in the Queen City family who have sold their depository receipts? A. My youngest son sold a small number and sold to these same people, and he knew the fellow, I think, that worked there then. And that's why I run into him.

Q. Do you know if any of the other officers or directors of the company have sold any of their depository receipts? A. I don't believe I do except what was brought out here this evening. The Hardisons, I think some of the Hardisons has sold some of theirs.

Q. Do you know to whom they sold? A. No, sir, I don't.

* * * * * *

Moore (971-73):

(971) Q. Fifty-six.

I am kind of curious about these transferable depository receipts, Mr. Moore.

Appendix G

Will you answer this question for me? Do you know, first of all, have you, or any officer, to your knowledge, of Transcontinental, Continental, or its subsidiaries, agreed, by contract or by oral agreement, to supply the funds necessary to purchase the depository receipts or to make a market in these depository receipts? A. They have not.

Q. Do you know what brokerage houses are handling the depository receipts? A. Of these companies?

Q. Yes, sir. A. No, I do not.

Q. You are not familiar with them at all? A. (Shakes head negatively.)

(972) Q. You have never heard of First Securities Corporation? A. Never heard of them before.

Q. What company do you use in the handling of your securities? A. Many companies handle our securities.

Q. In connection with the purchase of the shares which were held by Mr. Roberts in Safeway Company, Continental acquired, I gather, approximately 21 percent interest in that company through the purchase of the shares of Mr. Roberts, is that correct? A. Yes, it is.

Q. Do you recall whether it was the DuPont brokerage house that handled that transaction for you? A. Well, I don't know. Actually I didn't handle it. I wasn't here when that transaction was completed. So I don't know the details of who handled it. We did buy it, but I don't know through what firm. If you are trying to get at the Allen, John Allen connection, who is one of our directors, with DuPont, he is one of our directors and he is a partner in Francis I. DuPont and Company.

Q. Do you know—excuse me. A. I don't know what else you are trying to get at, because it is a fact. But I don't know who bought the stock.

Q. Well, Continental ended up with a 21 percent interest? A. That's right.

Q. But you don't know who handled the transaction, is that (973) right? A. No, I don't.

Q. Do you know whether Mr. Allen or the DuPont firm had any association or communication or agreement or any other connection with the securities houses that handled these transferable depository receipts? A. As far as I know, I don't know anthing about it.

Q. And a final question: What you are saying here in this hearing is that you know nothing about the market that was made in these transferable depository receipts? A. I don't know that there is a market as such.

Q. But you did seek— A. I understood from the testimony yesterday that there had been some trading. I mean, is this one, or is this ten trades, or one trade, or a hundred trades? How many, I have no knowledge of.

Q. And you are also saying whether there was one or ten, you know not how the trade or how the market was set up? A. No. Transcontinental has no commitments. I mean, we have no part of it.

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APPENDIX H

Initial Brief of Applicant Prior to Examiner's Report, January 25, 1965, pp. 109-110 (R. 53).

By the consummation of these transactions, the Commission will for the first time in the history of the industry enable a group of carriers under common control to achieve enough size and strength to compete, at least after a fashion, with Greyhound. To do as Interstate suggests and disallow these transactions, leaving Interstate free to pursue its own plans (for its own profit, one might add) is to allow Greyhound to divide and conquer the involved carriers and even further expand its grip on the industry. That is truly not in the public interest and must not be allowed to happen. Obviously, Greyhound would also like to see that very thing happen.

Both Interstate and Greyhound act as if these transactions are occurring in a vacuum. They both wish to treat them as unrelated to the practical facts which exist in the bus industry today. Interstate argues that the approval of these transactions results in restricting competition, and Greyhound says that they allow Transcontinental to get too big, too quickly.

Both of these positions are negative in approach. They ignore facts as they exist because of selfish interests. But the fact cannot be escaped that this Commission, consciously or unconsciously, right or wrong has over the years, created the monopoly that is Greyhound, and that today the bus industry is dominated by that monopoly. No carrier presently is big enough to contest with that monopoly on equal footing. Only Transcontinental has enough size to even try.

Appendix H

By approving these transactions, the Commission does create a duopoly within the bus industry, one side of which will be considerably the weaker. True, there is not then enough business left for the "third force," as proposed by Interstate. But again that is the *negative* approach. The *positive* fact is that in creating a duopoly, weak as one part of it is in comparison to the other, *the Commission is creating competition, not doing away with it. By putting Transcontinental in a position to compete with Greyhound, the Commission creates competition where there was none.* If it denies these applications in favor of the "third force," in effect it decrees that forever the bus industry will be a monopoly controlled by Greyhound with no force, second, third or otherwise, that can effectively compete with Greyhound.

To approve these applications is to create new competition where none existed before. To deny them is to condone a monopoly where no competition is possible. The choice should be abundantly clear.

Reply of Transcon to Interstate petition in ex parte 65 (Sub. No. 3), August 18, 1965, pp. 22-23 (R. 61).

In view of the Greyhound monopoly, the only logical and workable solution to the problem is what is being proposed by Transcontinental and the vendor carriers in the two mentioned Dockets. By the consummation of those transactions, the Commission will perhaps enable a group of carriers, under common control, to achieve enough size and strength to compete, at least after a fashion, with Greyhound. To do as Interstate suggests and

disallow those transactions, leaving Interstate free to pursue its own plans (for its own profit, one might add) is to allow Greyhound to divide and conquer and even further expand its grip on the industry. That is truly not in the public interest and must not be allowed to happen.

Interstate acts as if these transactions are occurring in a vacuum. It wishes to treat them as unrelated to the practical facts which exist in the bus industry today. Interstate argues that the approval of those transactions will result in restricting competition.

Such is not the case. This Commission, consciously or unconsciously, right or wrong, by design or otherwise, created the monopoly that is Greyhound. Only Transcontinental is anywhere close to being big enough to attempt to compete with Greyhound on equal footing.

By approving those transactions, the Commission creates a duopoly with one side of the duopoly being considerably weaker than the other. True, there is not then enough business left for a so-called "third force," as proposed by Interstate. But that is a negative approach. The positive fact is that in creating a duopoly, weak as one part of it is in comparison to the other, *the Commission is creating competition, not doing away with it.* By putting Transcontinental in a position to compete with Greyhound, the Commission creates competition where there was none. If it denies those applications in favor of a "third force," in effect it decrees that forever the bus industry will be a monopoly controlled by Greyhound with *no* force, second, third or otherwise, that can effectively compete with Greyhound.

Appendix H

To approve those applications is to create new competition where none existed before. To deny them is to condone a monopoly where no effective competitions possible.

The only effect which the proposed Guide Lines suggested by Petitioner could have, would be to affect the acquisition of carriers in the future and will have a real effect on only Transcontinental. Greyhound already has its monopoly and would of necessity continue to grow bigger, having cleared the way of effective competition for all time. Guide Lines in 1935 might have had some application to the bus industry and the shape which it was to take in the succeeding years, but to impose them at this point, without first doing something to break Greyhound up into smaller components would be to disregard present and existing facts. Its only benefit would be to Petitioners and, as an incident, to Greyhound. Everyone else, including the public, would be by far the loser.